Parol evidence is let in to rebut an equitable
way where there is a rule of law that Chancery have broke in upon, in such cases & in no
other proof is let in to rebut that equitable construction & restore the old legal rule ~~to~~
In Engd the law was formerly that the Exr
should have the residuum whether he had
a legacy or not, but now if he has a legacy left
him he shall not have the residuum — But
in this State he never has been entitled to the resid-
uum, & it seems clear even upon the English
principle that where he owed the testator
a debt he will be obliged to distribute it
to the next of kin, for in Engd where he
has a legacy and on that account is excluded
from the residuum, his debt composing a
part of such residuum must be distributed to the next of kin — 2 Atk 372, 239
See Salk 305 — 3 Atk 68 — 3 P Wm 40 — 2 Vern 91
1 Wills. 313. 1 Vern. 473 — 1 Bro. Can. 261, 328
The question whether an Exr can be excused
from distributing such debt may make a
figure in this State —
Where a Exr dies leaving an Exr the last Exr may
accept the last Executorship without accepting that of
the former testator, but he cannot accept that of
the former without accepting the latter —

Mode of computing interest established by the Superior Court in 1784

Compute the interest to the time of the first paymt; if that be one year or more from the time the interest commenced; add it to the the principal & deduct the paymt from the sum total. If there be after paymts, compute the interest on the balance due to the next paymt and then deduct the paymt as above; and in like manner from one paymt to another till all the paymts are absorbed; provided the time between one paymt and another be one year or more. — But if any paymt be made before one years interest hath accrued, then compute the interest on the principal sum due on the obligation for one year, add it to the principal and compute ~~the amount~~ the interest on the sum paid, from the time it was paid up to the end of the year; add it to the sum paid & deduct that sum from the principal & interest added as above. If any paymt to be made of a less sum than the interest arisen at the time of such paymt, no interest is to be computed but only on the principal sum or sums paid.

"The meaning of the legal phrase of "praying the parol to demur" is an instant motion to suspend the proceedings at law till the infant arrives at full age so that he may then have his election what point of defence to rely on.

First U. S. Law School Restored For Washington Bicentennial

Litchfield, Conn., Commemorates President's Visit in 1780 on August 27 in Building Tapping Reeve Erected on His Estate for the Institution

Special to the Herald Tribune

LITCHFIELD, Conn., Aug. 6.—In commemoration of a visit by George Washington to the village in 1780, Litchfield will celebrate the Washington Bicentennial on August 27. While honoring the memory of the first President, Litchfield will also pay homage to its native sons who played prominent parts in the nation's life during the early part of its existence. Among these are General Oliver Wolcott, Colonel Benjamin Tallmadge, Judge Tapping Reeve, founder of the first law school in America, and Judge James Gould, Reeve's partner and successor.

Washington, journeying from Hartford to West Point, stopped in Litchfield as the guest of Oliver Wolcott, a signer of the Declaration of Independence, member of the Continental Congress, and later a Governor of Connecticut. It was just at the time that Benedict Arnold was fomenting his plot to betray West Point to the British and possibly the American commander in chief would fall into Arnold's trap. Thus, Washington's presence in Litchfield is venerated more, because it was at a time of unforeseen peril.

Made Friends in Litchfield

The Wolcott mansion on North Street had been the scene of a strange incident a few years before. General Wolcott had stopped in New York while returning from the Continental Congress in 1776, and returning to Litchfield he took with him the headless torso of the leaden statue of George III, which had been pulled from its pedestal in the Battery by an excited mob of patriots. In Wolcott's home his daughters and friends melted the statue and recast it into some 42,000 bullets for the Colonial Army.

While in Litchfield Washington became better acquainted with young Oliver Wolcott, who later served in his Cabinet as Secretary of the Treasury as the successor of Alexander Hamilton. He also talked with Tapping Reeve, a young lawyer, who had served as a recruiting officer at the opening of the war and had gone to New York with a group of freshly recruited troops in a diversion movement aimed to rescue Washington in his retreat through New Jersey.

Reeve lived in a spacious house opposite the home of Oliver Wolcott. In later years, when his law school had become well established, he erected at the south side of his home a small building to serve as a law school. It is in this Little Law School building and the adjoining mansion, now restored to its original design, with its relics of its master and his pupils, augmented with an exhibition of Washingtonia, gathered from many sources, that the Washington bicentennial celebration will be centered this month.

After graduation from Princeton in 1763 and serving as a tutor there for a few years, Reeve removed to Litchfield to practice law. With him he brought his wife, Sally, sister of Aaron Burr and granddaughter of Jonathan Edwards. This was in 1772. Three years later his brother-in-law came to study law under him. Thus, Aaron Burr was the first of a long list of young men, later to become distinguished in many branches of the nation's life, who gained their legal knowledge from Tapping Reeve and the school which he founded.

They came from all parts of the Union—John C. Calhoun, young Oliver Wolcott, Peter B. Porter, Levi Woodbury, John Y. Mason, John M. Clayton, Ephraim Kirby, Ward E. Hunt, Horace Mann, Uriah Tracy, Stephen R. Bradley and many others. Of the students who studied in the Litchfield Law School, two became Vice-Presidents of the United States, six were members of Presidential Cabinets, three became justices of the United States Supreme Court, eighty-eight served as members of the House of Representatives, twenty-five were members of the Senate, fourteen were state Governors and many served in minor executive, judicial and legislative capacities. Reeve's all but forgotten school played a strong part in the early life of the nation.

Appointed Judge in 1798

Reeve erected the little law building at the side of his home in 1784. Heretofore it had been the custom for a law student to study in the offices of a practicing lawyer, but Reeve began to lecture to his students, speaking in a shrill whisper, for he had an affection of the throat, with the students scribbling hasty notes on his discourses. The lectures were in the morning and the students passed the afternoon studying and copying their notes into books. In order that they might have some semblance of practice, the students participated in moot courts, where two took a part on each side, with others acting as judges. Judge Reeve reviewed their decisions, pointing out the discrepancies in argument and legal doctrine.

Having been appointed judge of the Superior Court in May, 1798, Reeve saw the need of a partner in the school and he chose James Gould, a Yale graduate in the class of 1791, as his assistant.

For twenty-two years Reeve and Gould conducted the law school jointly. For purposes of teaching they divided the law into forty-eight titles. Reeve was particularly interested in the law of domestic relations—Baron and Femme—and he published an authoritative work on it in 1816. Judge Gould specialized in the law of pleading, molding his ideas into a treatise which was a legal guide for many years.

Retired in 1820

Judge Reeve retired in 1820, leaving Gould in charge of the school. Associated with Reeve in the life of Litchfield was Lyman Beecher, "the father of more brains than any other man in America"—Henry Ward Beecher and Harriet Beecher Stowe, who were both born in the family mansion on North Street. Beecher was pastor of the Litchfield Congregational Church for sixteen years.

Eulogizing Reeve at his funeral in 1823, Dr. Beecher said, "At a moment of greatest dismay, when Washington fled with his handful of troops through the Jerseys, and orders came from New England to turn out en masse and make a diversion to save him, Judge Reeve was among the most ardent to incite the universal movement, and actually went in the capacity as an officer to the vicinity of New York, where the news met them of the victories of Trenton and Princeton, and once more Washington and the country were delivered."

Reeve was gone, but his pioneering work in the instruction of jurisprudence lived long after him through the distinguished services of his students. Gould continued with the school for ten years. Meanwhile, he had married Sally Tracy, the eldest daughter of one of Reeve's first students, Uriah Tracy, then recently appointed a United States Senator from Connecticut. Portraits of James Gould and Sally Tracy, painted on glass, now hang in the American wing of the Metropolitan Museum. Coming from Yale, Gould brought with him certain collegiate practices. He was dignified and polished, and his lectures have been described as finished essays on legal practice. He inaugurated a school roster, from which the students later compiled the first catalogue of the school. This register now contains 794 names for the period from 1798 to 1833. These, with some 200 before the time of the roster, show more than 1,000 students attended the school in the fifty years of its existence. These students came from as far as Louisiana and Missouri.

Largest Law School for Ten Years

Other law schools were now functioning—Harvard, Yale and William and Mary. Yet the Litchfield school continued as the largest in the country. In the ten-year period from 1820 to 1830 Harvard gave forty-three Bachelor of Law degrees, while 284 were given at Litchfield.

Judge Gould associated with him in his conduct of the school Jabez W. Huntington, later a Senator from Connecticut, and Origen B. Seymour, later Chief Justice of the Supreme Court of Connecticut. But in 1833, when Gould's health had become impaired, the school was closed.

The Reeve property was acquired by Mr. Lewis B. Woodruff, of New York, after the death of Reeve's widow. It continued in the family, being known as the Woodruff mansion until the death of Lewis B. Woodruff, a grandson, in 1927, when it passed into possession of Yale University. In 1929 it was acquired by the Litchfield Historical Society and restored to its original condition, and now holds memorials of its history in furniture, engravings and books. Meanwhile, the Little Law School building had been moved to another part of the village. It was finally brought back to its original place and dedicated a year ago as a public shrine by the Bar of the United States.

Litchfield, bought from the colony of Connecticut in 1718 for £300, settled in 1720 with a surrounding palisade to ward off Indian attacks, was in Revolutionary times, as now, a village with outstanding examples of Colonial homes. Besides the Reeve, Beecher and Wolcott homes is the mansion of Colonel Benjamin Tallmadge. He served prominently in the Continental Army, commanding troops at Morristown, N. J., and in the capture of Andre. At the close of the war he purchased a house in Litchfield and resided there until his death in 1833. His home is now occupied by his granddaughter, Mrs. E. N. Vanderpoel, who is serving on the committee in preparation for the forthcoming Washington Bicentennial celebration.

First Law School Building in the United States

Restored structure at Litchfield, Conn., where Washington bicentennial celebration will be held August 27

Find Bones 100,000 Years Old

BUDAPEST, Aug. 6 (AP).—Workmen who had lost their jobs with a scientific expedition were so certain that discoveries could be made in a certain cave of the Hor Valley in the Bukk Mountains that they persuaded an official to advance them $50. They found human bones which experts of the Hungarian National Museum say are between 100,000 and 120,000 years old.

within our own country. On that we can count, and it is a good deal. It is enough to account, sooner or later, for a fair-sized boom. But attainment of our real capacity, achievement of permanent new growth and a state of business higher than ever before, must wait a normal condition in international trade. That may be a considerable time in coming.

By the series of business storms that have taken place in Europe, Asia, South America and elsewhere, extremely serious impediments to international trade have been created. The changes in the purchasing value of many currencies are alone enough to constitute dams in the channels of trade. The debts due our government from European governments are an obstacle. The tariffs which one scared country after another has set up will make normal international trade impossible so long as they last.

The overcoming of these obstacles will take a long time; and until they are straightened out the United States, and every other country, will fall short of its full potential prosperity.

There have been serious lessons in this depression that the country should take to heart and long remember. Some things have happened that should never be repeated. The wave of failures of banks has been unforgivable.

nearly all instances wet delegates had been elected to the county conventions. It was then a mere formality to send wet delegates from the counties to the state convention, which adopted a resolution declaring for a resubmission referendum. The Texas delegation to Chicago voted for outright repeal of the Eighteenth Amendment, and, according to dry leaders, threw Garner over, so far as the Presidency was concerned, and cast their votes for Franklin D. Roosevelt.

Effect on Party Course Unknown

What effect that resubmission result will have on the party's future course in this state is not yet apparent. The question was not an issue in any campaign for Congress prior to the primaries on July 23, and it is not being discussed by the candidates in the run-off contests, which will be settled August 27.

Only three members of the state's present Congressional delegation are avowed wets and two of these were renominated in the first primaries, and the third, Richard Kleberg, has a wet opposing him in the run-off in the San Antonio district. Garner, who was renominated for Congress in the 15th District, favors repeal. It is unlikely that any of the Texas dry members of Congress elected in November will consider the result of the resubmission referendum as binding on them.

the Charles H. Crisp are running for the unexpired term of the late Senator William J. Harris.

Georgia will elect two United States Senators this year, but Walter F. George, whose term expires next March, has no opposition for the Democratic nomination. J. W. Arnold, of Athens, Republican National Committeeman, will oppose him in the general election.

Major John S. Cohen is serving temporarily as Senator Harris's successor, but his appointment will expire when the election is held, and he is not seeking the nomination.

Crisp Organizes Campaign

Representative Crisp has a well organized group at work in his behalf. Governor Russell has been busy delivering commencement addresses at colleges throughout the state. The peace officers of the state met in Savannah recently, and the Governor was present. He also attended the convention of the Georgia Bar Association at Warm Springs.

Recently the Governor and the Congressman have indulged in some sharp passages that have brought the campaign prominently before the people. The Congressman began it with a state-wide radio program in which he vigorously assailed the "long public job-holding" record

Atlanta List Misleading

While these are the official addresses of the candidates as given out by the secretary of the state executive committee, several of those credited to Atlanta are not citizens of this city. Edwards is a resident of Valdosta. He is a representative in the General Assembly and probably in that way was assigned to Atlanta. Talmadge is a legal resident of Telfair County, but lives in Atlanta because he is Secretary of Agriculture. Kelley is an Assistant Attorney General, but his home is in Gwinnett County. Holder lives in Jackson County.

Kelley is regarded by some as the Russell "heir apparent." Holder has run for Governor several times without success. He is a former chairman of the State Highway Board.

Summers's candidacy is in the nature of a protest against the way he says he was treated by some of the supporters of Franklin D. Roosevelt when he was busy lining up the state for the New York Governor in his race for the Presidential nomination.

In the Senatorial race Crisp has the support of "The Macon Telegraph," "The Atlanta Constitution," "The Savannah Morning News," "The Albany Herald" and several other daily papers. "The Atlanta Journal" has taken no editorial stand on the Senatorship but is expected to support Russell.

To press its case the commission has appointed Huston Thompson, former Trade Commission chairman, as special counsel. Whether an appeal will be taken from the recent adverse decision of the Norfolk court is expected to be decided within a few weeks. This decision, however, is not regarded as conclusive by the government, which views it as a step that must be disposed of in preliminary maneuverings before the real issue can be settled.

In one form or another, the New River case has been up for several years. It was handed along to this commission by the old commission of cabinet officers that passed out of existence in 1930 without a definite decision. Consideration of the problem by the present independent commission led to throwing it into the courts for settlement.

135 Plaintiffs in Land Suit

LAREDO, Tex., Aug 6. (AP).—An old Mexican land grant case recently settled in district court here, involving almost 11,000 acres, had 135 plaintiffs and intervenors and thirty-five defendants.

Gains Likely in House To Be Elected This Fall

dicative of anti-prohibition gains, despite efforts of the drys to minimize it.

The Texas result has put Senator Morris Sheppard, sponsor of the Eighteenth Amendment in the Senate, in an embarrassing situation. Since the referendum Representatives Clay S. Briggs, of Galveston, and Daniel E. Garrett, of Houston, both drys, have announced they would abide by the referendum. Representative R. Ewing Thomason, of El Paso, previously dry, announced before the primaries that he would support resubmission.

In Alabama Senator Hugo L. Black, who is dry, came out for resubmission before he was renominated. Florida has felt the anti-prohibition movement strongly as indicated not only by the defeat of Representative Ruth Bryan Owen by Mark Wilcox, an outright repeal advocate, but by other developments indicating practically a complete turnover of the Florida delegation from dry to wet. The veteran Senator Duncan U. Fletcher, who is up for re-election this year, is a new recruit to resubmission.

Other Recruits to Resubmission

Other recruits in the list up for reelection include Senator Alben W. Barkley, Democrat, of Kentucky; James J. Davis, Republican, of Pennsylvania; Carl Hayden, Democrat, of Arizona; Ellison D. Smith, Democrat, of South Carolina; Frederick Steiwer, Republican, of Oregon; Samuel M. Shortridge, Republican, of California, and James E. Watson, Republican, of Indiana.

Senator Smith W. Brookhart, Republican, of Iowa, perhaps the most intense dry in the Senate, has been beaten for renomination, and there is no doubt this was partly due to the feeling of wet Republicans against him. Henry Field, seller of seeds and farm supplies, who defeated him, is known as a dry, but did not make that the chief feature of his campaign.

Representative John J. McSwain, of South Carolina, recently announced that the entire delegation from his state in the House would support the Democratic repeal plank. This marks a shift of great value to the resubmissionists.

Need Unity on Amendment

While there is a distinction in the platform sense between support of resubmission and repeal, the resubmissionists in the new Congress will include outright repealists and all others willing to submit a new liquor amendment to the states. If they are to get anywhere it will be necessary to sink their differences on details, get together on an amendment and unitedly vote for it.

In West Virginia all the Democratic nominees for the House are standing on the Democratic platform. Inasmuch as that state is showing a strong tendency to go Democratic this fall, their stand has a considerable bearing on the outlook for anti-prohibition gains. The defeat of Representative Willis C. Hawley, Republican, of Oregon, former chairman of Ways and Means and a dry, by James W. Mott, a resubmissionist, is accounted a gain by the wets.

The primary developments in Ohio have encouraged the hopes of the wets to control the next House. Wet leaders predict that not more than eight drys will be in the next House from Ohio, long the stronghold of the Anti-Saloon League. While it is generally expected Senator Robert J. Bulkley, Democrat and wet, will be re-elected, his Republican opponent, Gilbert Bettman, also is wet, and from the prohibition standpoint it makes little difference who wins.

In some respects recent developments in Indiana are more striking than in any other Northern state. The two major parties in that state, just before the national conventions, declared vigorously for a change in prohibition. The movement for repeal of the Wright state enforcement act also has great strength. The Indiana delegation in the next House will apparently be wet with few exceptions, and Senator Watson, as already indicated, is now for resubmission.

Indiana "Revolution" Surprising

When it is considered that Indiana for years was looked on as a Gibraltar of the rigid drys, the revolution in sentiment there is astonishing. And, while many political observers insist that a huge bone dry vote will be rolled up in Indiana, as in some other states supposed to have shifted to the wets, it is evident that the ablest politicians of the two major parties in the state believe that the people have turned against the Eighteenth Amendment.

Other instances arising from the primaries and conventions might be given to show that a damp wind is blowing. At the same time it should be borne in mind that the drys can suffer large losses and still hold a majority in one or both houses and that the wets can make big gains and not reach the two-thirds goal. The road to submission of a new amendment, even from the standpoint of the most optimistic wet chiefs, is still long and rough.

Not the least evidence of national unrest over prohibition is to be found in the fact that referenda are to be held this fall in about a dozen states. In general the purpose is to test sentiment on repeal of the Eighteenth Amendment or on state enforcement acts or both. Texas had its referendum on repeal July 23. States which will have votes on repeal of the Eighteenth Amendment in November include Louisiana, Wyoming and Connecticut. States which will vote in November on repeal of state enforcement acts include Louisiana, California, Oregon, Michigan, Washington, Colorado, Arizona, North Dakota and New Jersey.

Rhode Island, Massachusetts, New York, Wisconsin, Montana and Nevada have repealed their state enforcement acts. The Illinois Legislature passed a repeal measure in 1930, but it was vetoed by Governor Emmerson.

Litchfield

Minutes of the Lectures Of Tapping Reeve Esquire Taken in his Office by Rob.t Fairchild Student A.D. 1794

 Continuation of a Lecture on Contracts—

Of such defense as at Law may be made against Contracts, whether Parol, reduced at length to writing Sealed, or reduced to writing engaging to pay a sum of Mony or perform a duty which on the face of them import a value received— and 1st

Of Parol Contracts—

1st Coverture may be plead
2nd Infancy
3rd Fraud
4th Usury
5th An illegal consideration stating its illegality
6th Payment & performance
7th Discharge before breach
8th A release since the breach
9th Statute of Limitations—

10th That it was impossible stating the impossibility

11th That a security of a higher nature was given

N.B. If those matters appear upon the face of the contract as stated in the declaration it is a good general rule that such declaration may be demurred to - to this, the Stat. of Limitat.ns is an exception it must be plead

12th Accord & Satisfaction -

Accord & Satisfaction is not only a defence in case of an Assumpsit but in most other suits in the personalty - in all where nothing but damages are recoverable - not applicable to real property (& not pleadable to a demand due already by bond, Bill &c - but if the accord is executed before day of payment it is good - No satisfactory reason can be assigned why it should not be a bar in case of a Bond as well as in other contracts. The origin of this practice was this - Bonds were taken with penalties & when these were forfeited a man would not choose to pay them up but only the original debt, therefore after the penalty was forfeited Courts would not suffer accord & Satisfaction to be a bar to the debt, tho' before it was due that would be sufficient

Quere. Is this true? Not in this country

1 Rep. 1 b. Pro. Sac. 050.

Contracts

Accord & Satisfaction may not be plead where there has been no consideration — As if a man should take away Cattle & afterwards offer them to the owner & prove that he accepted them, this would not be a sufficient bar as no Satisfaction was made for the injury. There must be some consideration & that of value in a pecuniary view — no matter as to the quantum — a pepper corn is sufficient. A less sum of money received for a greater is not a good plea — As if a man should receive 5 £ in satisfaction of 10 £ This would not do for the Court knows that 5 is not 10 But if it had been a walnut in satisfaction of the 10 £, this would be sufficient for How could a Court possibly tell but that a wal-

ll. 78.
Mod 88.

nut is worth 10£ What presumption would it be in them to decide whether or not a barley-corn is worth a million pounds! A shilling pardon is not a sufficient consideration but why might it not be more genuine satisfaction to a man who is injured to receive the pardon of the offender than to receive 2d — As if one man assault another & afterwards repents & offers pardon in satisfaction of the injury, Bould he not be more likely to receive that, than a promise to pay 20£ yet in the eye of law the former is no consideration, while the latter is abundantly sufficient. It is fruitly evident the original meaning of the law was that the consideration should be of equal value with the debt, & the compensation equal to the injury. It is true that it would be impossible for the Court always to distinguish with accuracy between the debt & consideration — As if a man sold a horse for a note of 20£ should receive 19£ for a horse supposed to be worth 20£ the payment of the

Strange 1.126
Eliz. 193
9 Rep. 79.
6 Little 212

Contracts

old be a sufficient consideration for the horse – it would be difficult & indeed impossible for the Court to determine that the horse was worth 20£ or 19£ as the ideas of men are so various respecting the value of horses. In matters of such trifling difference we should not expect them to decide upon the value of articles; but this can be no reason why they should descend into such ridiculous absurdity as to say that a peppercorn is a sufficient satisfaction where 1000£ would be ~~altogether~~ insufficient. The consideration must also be of legal value in order to be a good plea – an equitable value Will. Gilbert is insufficient. A release of a redemption in equity 6. is considered as no satisfaction, tho' it were really worth a million. The accord must also be certain & executed by the parties a 125. tender will not do tho' it were more than 11. 29. sufficient. Cro. Eliz 193. Yearge 573. 9 Rep. 80.

N.B. * ~~Sufficient reason Rabbits &c per~~ There is a decision in Lord Raymond 602 that an equity of redemption is a sufficient ~~satisfaction~~ consideration to support an agreement by release

Contracts

Lecture 2nd 13th An award of arbitrators is a defence against contracts.

An award is a judgment rendered by persons chosen by parties, concerning some question in dispute. When an award has been rendered legally, it is a good plea against almost all claims as well as those of a parol nature, which last we have been particularly contemplating. There are some matters which cannot be left to arbitrament. Awards therefore in these instances would be altogether nugatory. Criminal & matrimonial affairs & other matters of a public nature are beyond the jurisdiction of arbitrators; but almost all disputes among individuals are subject to arbitrament. The titles of land are arbitrable; but in Eng. no title can by any means be given by the award. The bonds given to abide by it are forfeited by non-compliance. In England bonds are absolutely necessary in arbitraments concerning real property. for as no title can be conveyed by the award, such

award would be perfectly nugatory unless bonds are entered into to abide it, so that rather than forfeit them the party against whom the award was rendered would peaceably wave his title. The reason why no title can thus be given is because livery of seisin is necessary & arbitrators cannot be supposed to do this. But might it not do to deliver up the deeds to the arbitrators, as an escrow & suffer them to give the title to whom they please? This would by no means do, for it would be a temporary suspension of all right to the land & break in upon the sacred maxim of the English law that no fee can commence in future, or contingency. In this respect the English Law differs from ours — as we have no such disgraceful maxim. The deeds may here be delivered up to arbitrators, & they will convey the land to which party they think proper.

Debts certain due upon bond, bill or note are arbitrable & if the parties choose they may acquiesce in the award, but such award is in reality no defence against an action founded upon them. Yet if

bonds are given & the award not complied with the bonds are forfeited, but if the ground
Ob. 43 of recovery was not the deed only, but by va-
Co. Lac. for of some subsequent wrong an award is
99. a good defence - An award is a good defence against a bond, if the award was before the bond was due. Payment of the condition is always a good defence - But where there is no condition & the debt grows by deed itself without any subsequent wrong, as in a single Bill, an award is no plea. In Connecticut there is no difference between bonds, bills & other writings. - All other matters beside the exceptions already made, are arbitrable - All matters of controversy whether contracts or torts are not only arbitrable but an award is a defence against any action brot, nor is it necessary to its validity that there should be any writing respecting this matter. The powers of arbitrators are equitable as well as legal, for the remedy they give may be specific or in damages. It is commonly the case that

The fact of paym't proved is sufficient.

the award is in writing but whether in writing or not, it is as operative as a judgment of Court. As if there is a dispute concerning a horse & it is settled by arbitrators who owns him, the property of the horse is completely vested in him. Where there is a submission by parol & a sum awarded, if the deft wishes to make use of it as a defence against an act. debt, he must plead the award & performance, for if he has not performed, the award is no bar to the plf's recovery on the original cause of action.
If a time is limited for performance, in the interim no action can be sustained upon the original cause of action. after the time limited & it is not performed, the Plf has his election to bring his action of debt to recover the sum or an action founded upon the Assumpsit contained in the submission. if it be to do a collateral act as to deliver an horse &c his remedy is an action on the case. If the award is specific as that such an horse is the property of A. A may maintain trover. All submi-

8 Cok 31. sions whether by Parol or writing are revocable If it be by parol & the submission is revoked no action lies – if by bond the bond is forfeited – We have a practice of chancery (they will not meddle with the legal costs) down bonds to equitable costs – Where the submission is by bond, note or covenant if the Deft wishes to use the award by way of defence, he may whether he has performed or not, for his bond is forfeited and this is a security of an higher nature than the original cause of action – If the Plf wants his remedy it is upon the instrument If upon a bond the penalty will be changed down to the sum of the note – If on note the practice is to endorse down the note, be done by the arbitrators, or if the note is not endorsed, you may plead that it was an arbitration note & shew the award which will be the rule of damages on the note – If on covenant that is to pay the sum of the award, the Plf must then set out the award &c. Submission by rule of Court is when arbitrators are agreed upon by the parties & appointed by the Court – There are

in some respects different from other Submissions. The authority of the Arbitrators may be to settle any one controversy or all the controversies between the parties. These submissions both in Eng. & America depend wholly upon Statutes. The Eng. mode of enforcing judgmts is different from ours. If either party will not carry into execution the award ~~his fees~~ they are it is considered as a contempt of the Court 95. & they will issue an attachmt against him & confine his person till he will comply. The Pff may bring his action upon the award. If, however, the person awarded against dies the remedy by attachment fails. The remedy under our Stat. is much preferable to the English. An execution is issued for the sum awarded which precludes any necessity for an attachment or any other action. If the submission should be revoked here, it would be a contempt of the Court. We cannot tell however what a Court would do in this case for there never was an instance of such a revocation. — —

An award that a man shall make Satisfaction any way, by asking pardon for the injury or in any other method is a Sufficient defence.

Lecture 3rd

Who may submit to Arbitrations

It is a general rule that all persons not disqualified from making contracts may submit their controversies to arbitration. Executors & Trustees may submit & as it respects them the award is binding; but those for whom they submit the controversy are not bound by the award. It is therefore advisable for Executors & Trustees not to submit to arbitration controversies which concern the persons for whom they are employed; Yet if those who employ them are satisfied with the award, it is a sufficient defence for the executors. If they make any contract & this contract is not prejudicial to the interest of the persons employing them it is binding upon those persons. But if the executor makes a bargain that will injure the estate of the heir, the heir is not bound by it. — Infants are allowed to

Submit to arbitration - tho' they have their election either to abide by the award or avoid it, this election is not reciprocal between infants & adults, the adult being bound
Ch. 77. at all events. The husb^d may submit any matter which he is entitled to in right of his wife, as bonds, Leases &c, but if it relates to the inheritance, she must be made a party. Lunatics &c cannot submit to arbitration on the ground that they are incapable of contracting. - Persons may sometimes submit for strangers, but provided such strangers do not comply with the award, the bonds are forfeited by him who undertakes to represent the stranger. - When a Submission is made by an attorney, the award is as binding as tho' the employer himself had submitted. It has been a question among Merchants whether one partner may submit a controversy for his co-partner - it is now determined that he cannot, unless this power be one of

the articles of agreement - But the Partner who submits, is at any rate bound by the award, & on refusal to perform it forfeits his bond - There many are concerned cases may happen that the act of one is consid[d] the act of all - As when several have committed some wrong & one of them submits to arbitration & by the award is to pay a certain sum the person injured is here supposed to have obtained a proper compensation for his injury & it would be unreasonable that he should obtain separate compensations from every one that was concerned in a joint act. If A. bails a horse to B which is taken away by C. and the two latter submit the ~~matter~~ affair A is bound by this award as it respects the trespass C, but has a remedy against B. - Here a Question arises Can the Bailor bring an action against the trespasser after the submission, but before the a

There seems to be no authority in point,
we but it is apprehended that the Submission
is no bar, for altho' one action by the Bai-
lee, excludes the Bailor from another action
against the Trespasser, yet a Submission has
not that effect tille the award be made.

Who may Arbitrate?

An arbitrator must be a man of common
sense - if he is a person destitute of under-
standing either party may take adoan-
tage of this circumstance to nullify the
award. An infant or feme covert can-
not be arbitrators. So the disgrace of ~~the~~
~~English law book~~ ~~sense~~ there is a Question in Books
whether a man may arbitrate his own
case - as ridiculous as the idea is, this
10. 11. principle is supported by an authority
'66. in ~~Modern~~ Hardres, but contradicted by others - Hardresp
'6. a
trade.

How may an award be set aside?

If an award be by parol & an action is found-
ed on the assumpsit contained in the Submission,
now assumpsit may be plead, & the arbitrators

of the award be given in evidence - If the action be brot upon the award for a sum certain, the Deft must plead no award & give in evidence the corruptness of it - If the action be brot on the bond, the deft must again plead no award &c - The Pl in such cases does not close by saying there was an award but replies over stating the award & moving a breach -

An award may be corrupt three ways particularly 1st by being founded upon matters not contained in the Submission - 2nd by falling short of what is contained in the Submission & 3rd by exceeding it - If corruption in the arbitrators can be proved, the award is destroyed or if it is clear that there was great partiality - An award may also be set aside by a mistake of Facts - but Courts seldom meddle with awards of the last kind - The rule of Courts of Law is not to look back into the principles of the arbitration, it being generally presumed that arbitrators have done justice -

If however the mistake is founded upon the false principles which they lay down & by which they acknowledge they were influenced, a Court of Law or Equity will interfere. When there is a mistake in point of fact Chancery will always interfere & suffer an enquiry into the merits of the case that the mistake may be pointed out — But if the mistake is upon a question of Law neither a Court of Chancery or Law will interfere. The admission of illegal testimony may set aside an award founded on this testimony. New discovered testimony is also another ground for setting aside an award. This by application to Chancery — The Court will only set aside the award so as to leave the parties open to a second trial, either to a submission to arbitrators, or to an action at Law. If illegal testimony is admitted in a submission by rule of Court the ground in Chancery is a ground in Law & a Court of Law in such case will always interfere. If the award be drawn up in the nature of

a Special verdict stating the whole proceedings & it appears upon the face of it not to warrant a judgment, the Court will set it aside. This effected by a remonstrance. An award must be certain, else it is void. As if it was awarded that the Deft should give Security to pay the Plf an annual
Sharpe 1024. sum &c this void because no security was mentioned specified. If it should be awarded that A should release all that B owed him, such award would be deficient on account of its uncertainty. But where the Court can make it certain there will be as where it was awarded that the Deft should pay all the costs without mentioning legal or equitable this was held to be certain, on a Clause in Blackstone which says, where cost is mentioned without a qualification it means legal costs. An award must be final i.e. It must be so that no action can possibly be founded on the original claim. As where it was
Sharpe 1023. awarded that all manner of proceedings depending at Law should be no farther prosecuted

This was not final; it staying only proceedings then depending; — it ought to be all future also. An award must be possible to be performed. The same rule obtains in this case as in contracts. — It must be lawful, for no award is permitted to counteract the Law — An award must be reasonable; — if it is that one man shall serve another it is not good; if it be that one shall procure a thing out of his power, or that he shall cause a stranger to do a certain act, the award will be good in neither case, unless in the latter, he has the means to compel the stranger to do the act. — Awards must be mutual — in the case before mentioned where the Defft. 53. was to give up all proceedings, this was not mutual, because nothing was awarded to be done on the part of the Plf — The controversies must all be settled at one time — & must be beneficial to the party in whose favor the award is made. 50. & 51. If the submission be of all controversies & it is awarded respecting one only — This according to the authorities is a good award, for it shall be presumed that they acted according to the submission, unless the contrary can be proved.

If the award is to release all demands up to the date of the award, it is within the submission, for no demands shall be presumed between the Submission & the award - if indeed any are shewn the award may be affected.

If it be awarded that A. pay owes B 20 £ & instead of paying the cash, he shall deliver B. a certain horse. Some authorities suppose the arbitrators have gone out of their jurisdiction, but it is now settled that such an award is good, for it is only awarding a collateral thing for a sum of money which they have a right to do

Some are of opinion that where several controversies are submitted severally, & the award is void in part, it is wholly void - But it is apprehended this rule is not universal & that no thing conclusive can be drawn from what Reeve Bacon says on this subject. The true rule as drawn from the authorities may be founded on this universal principle - "That arbitrators may determine every controversy submitted to them either severally or in gross." If therefore they are awarded in gross, & on part is void the whole transaction is void but if severally,

the badness of one cannot effect the rest.

If the arbitrators award as to a particular fact out of the submission, which fact is so immaterial as not to shake the validity of the award this circumstance cannot set aside the award. As where a controversy respecting land was submitted, and it was awarded that one party should convey & that his son should join in the conveyance, this award was not consid^d corrupt: But if a fact it is awarded as to a particular matter out of the submission & the award would not be valid without this matter, or even if it affects the validity of the award in the least, such award may be avoided.

The 5th Defence against contracts. Tender

Of Tender

A tender is an offer to fulfil an engagement which a person is obliged to perform. It is a defence against all claims when the debt or duty due can be so far ascertained that a person may know how much to tender. It is also a defence against bonds certain due. There is no such exception relative to bonds, bills &c as there was in payment, arbitrament &c. The reason why

there is no such distinction, is that there is no such thing as making a tender, tho the debt or duty is due – whereas in a accord & satisfaction must be made before the debt, on Bond is due &c See Page 2nd There is a difference between our practice & the English as it respects a tender – tho there does not appear to be any difference in principle – Here a tender may be made after a suit is instituted if it can be ascertained what the costs are – in such case all costs must be tendered as well as the original debt – In England if a suit is instituted the person who means to tender must bring in his money by rule of Court – Tender is no plea where the debt sounds only in damages – for as persons are of various opinions respecting such matters damages cannot be sufficiently ascertained to know how much to tender – There are particular Statutes in Eng. authorizing persons in particular cases to tender where the sum is doubtful & cannot be ascertained We have no such Statutes in Con. regulating this subject. Our law upon tender depends altogether upon Com. Law. In case of a tender

of mony to redeem any pledge, the pledge vests in the tenderor, all right to it having gone from the Pawnee, on the moment of the tender. The same as to a mortgage, but in both instances the mony is vested in the tenderee. A case may happen where the mortgage will vest in the tenderor, on his making tendry, without ever being liable to paying the mony to the mortgagee. As if a man should make a voluntary mortgage to be given up upon his paying the mortgagee 100£, if he should tender the 100£ & the mortgagee would not accept, the land vests in the mortgagor without ever being liable to pay the 100£. for no debt or duty was due it having been a gratuitous grant.

In case of a bond with a condition, a tender of the sum contained in the condition is a complete defence against the bond. This depends upon the nature of a bond. A bond must always be sued upon the penalty & such penalty cannot be forfeited till the condition is broken or fails to be performed. A bond is given by A. to B. with a penalty of 15£ to be incurred on the failure of A's paying to B. 5£ at such a day, only signifies that A. owes

B. 5£ the sum contained in the condition-
if therefore this 5£ is tendered the Bond as pen-
alty is evidently discharged, as much as if the
Reeve 5£ had been accepted- As the sum is thus
tendered the tenderor becomes bailee to the cred-
itor & no action ought to be sustained upon the
Bond- The action should be an action of indeb.
Assump. This a new doctrine contrary to the
generally received opinion, but appears to be
founded in reason. & the principles may be gathered from th

Effect of tendry of money upon ordinary Debts

If the Debtor does all his duty, tenders the
money fairly, he suffers no more inconvenien
it operates for him just as favorably as tho'
he had paid the debt- He is only to come into
Court & plead "That he has tendered, has ever
been ready to pay & is now ready"... no in-
terest is to paid after tender, tho' demanded-
The tenderor may loose the benefit of his tendering
if he is not always ready to pay on demand.
If the creditor after tendry makes a reasonable
demand, & the debtor refuses to pay the money
he is left in the same situation as if he had
never tendered, only interest would be struck

out from the time of the tender to the time of the demand. This demand must always be reasonable; it must generally be made when the debtor, or (as we should call him) the bailee, is at home, & if away from home if it can be proved that he has the money, this would be sufficient—

Operation of Tender upon some collateral matter, not money—Here the Debtor has nothing to do but tender, he is not obliged to keep the things tendered—As Cattle & other burdensome ~~goods~~ articles, which are either expensive to keep inconvenient to keep—The Deft need only come into Court & plead simply 'That he has tendered.' The tenderor has no further claim upon the article tendered, but it immediately vests in the tenderee, & if tenderor takes care of the property & will not deliver it upon demand from the tenderee, he is liable to an action of trover—Tho' if the article was expensive to keep the tenderor has a lien upon it, till this expence is paid. As if Cattle are tendered & afterwards fed by tenderor this must be paid before the tenderee can take them.

Reeve

"Where cattle or money are tendered, the true idea is, "That they both vest in the tenderee" This is the only principle by which authorities can be reconciled & the only one which is reconcileable with reason. As to collateral articles it is generally & universally allowed that they vest in the tenderee - But that money thus vests in the tenderee is far from being generally agreed. The reason why it is said not to vest in the tenderee is "That the action is after tender brot upon the note" which could not be the case if the tenderor was only bailee - This objection is easily obviated - The action is brot upon the note, in order that the note may be brot up to view & be lodged in the files of the Court, so that after the debt is paid it might not rise up & be again recovered - for it is easy to see that if the action was brot against the tenderor as bailee, the note might be kept secret and another demand made for the same debt - Suppose a debtor has tendered his debt (the money) & afterwards his house is burnt - Who shall be the Loser? on all hands agreed that the Creditor but what can be more nonsensical & absurd than to say the tenderee shall be Loser, if the money d

not vest in him. The tenderor in whose house it was burnt does not own it for if he did, he would be the looser, & if the tenderee does not own it, there is no loss in the case. Upon this principle the money from the time of the tender to the time of the demand, would undergo a temporary suspension of its existence, & if lost within this time, nobody would be the looser, & a thief ought not to be apprehended for stealing it. The fact is that in both instances of money & collateral articles, they when tendered vest in the tenderee. To suppose the contrary in case of money would do great injustice if the money was lost by accident, the tenderor being only Bailee to the tenderee, liable indeed to account for the money in a suit upon the note, but this for the benefit of the tenderor that the note may not rise up hereafter. The law is made in favor of the tenderor & is most the most unfavorable to the tenderee as being most blameable in not receiving the money when tendered. The very fact that the tenderee has a right to demand the money clearly shews that the tenderor is only bailee. If the note can be proved to be lost, or out

of the way, in any such case an action of indeb. assumpsit lies. which clearly proves in favor of the principle before laid down "that the tenderer is merely a bailee to the tenderee".

Where a Creditor is the cause of the tender not being made, if there is any loss happens in consequence of his not being ready to receive it, he is to be the looser, & not the debtor— As if the creditor is out of the Kingdom & has no settled home & has left no agent with whom the money might be left, in such case the debtor Hardgrave has only to declare before evidence that he is ready to pay the debt & wishes to do it— This is just the same in Law as tho he had tendered it— If a man cannot tender to take up a mortgage because the mortgagee was not to be found he may re-enter, as if he had made payment. If there is an agent it is necessary to tender to him. — This principle of the creditors being inaccessible &c applies to all kinds of debt. The creditor is to bear any loss by depreciation &c, & any other accidental loss in consequence of his "inaccessibility".

Here naturally arises the subject of defalcating the sums due to refugees before the late war.— In some States Statutes were

made to defalcate such debts. It is said by some that those Statutes were in violation of the Treaty of Peace if so they were ipso of consequence repealed, for no Stat. can be made contrary to treaties. It is apprehended that these Statutes may be reconciled with & are perfectly consistent with the treaty, on the principles before laid down. The Treaty says that the tories should be secured "the whole of their just debts." They became inaccessible to their debtors, so that when the money was good, they were not here to receive it. Suppose the loss had happened any other way besides by depreciation, who would have borne it? The creditor certainly. It would be just as unreasonable for the debtor to bear the loss in this instance, as it would for the faithful tenderer to bear the loss of that money which he had tendered, but which unfortunately was burnt up with his house. The loss had happened before the treaty of peace & was not to be repaired by the treaty. We may therefore fairly conclude that just debts might be defalcated, & the tories notwithstanding be secured "the

whole of their just debt."

Lecture 5th. The Authorities on first sight would seem to contradict the Principles before mentioned; for they say that in cumbrous articles, tender discharges the duty completely — but that the tender of money does not discharge all duty. This is very true & upon examination will be found to agree perfectly with the ideas before suggested — In case of money the duty that remains after the tender is simply the duty of a bailee & the tenderee of cumbrous articles may also impose upon himself the same duty, if he pleases to take care of them after tendry which is frequently the case.

Of Tender in case of Book-debt

Some have supposed that a tender of a book debt would not be good on account of its being difficult to ascertain what is due. This however is false for it almost invariably is capable of being reduced to a certainty. The

George 376. notable idea is that a tender of a book debt is good tho' it is not fully settled —

By whom a Tender may be made —

A tender may be made by any person employed as servt or agent to the Debtor, or his proper re-

representative - as executor or administrator, but a tender made by a Stranger who has no concern in the matter is good for nothing. Some say the tender must be personal made by no body but the Debtor himself - None however pretend that this is the general rule, but they confine it to particular cases, and make this distinction. As if a man engages to pay another a certain sum, it must be done personally - But if at a fixed day it may be done by others - There is no reason in this distinction & it seems to be opposed to another principle in the English Law "That a person by simply naming himself includes his proper representatives"

Manner of tendering.

It will not do simply to ask a man whether he will accept the debt, or to tell him you are ready to discharge it - But the money must be produced, offered for acceptance & counted before evidence, so that it may be known whether there was money sufficient to discharge the debt.

The Kind of Money that may be tendered.

In England no money is tenderable but English or that which is made current by proclamation.

We have no fixt practice here of proclaiming what shall be current coin – Any coin that is common in circulation & will pass among our Merchants is tenderable – Tender will not do of coppers for a sum of any considerable value, no more than a few for the sake of making change where it could not be made without them. It is the common received but erroneous idea that Coppers are tenderable – Bank notes are tenderable in such places where they are in general circulation; but not the notes of any distant Bank that do not pass currently in the place where tender is to be made. Counterfeit money is not a good tender – Our Statute has pointed out a remedy to recover good money where counterfeit has been received ignorantly. Formerly Com. Law afforded a remedy to recover true for counterfeit money – but our County Court have lately refused to do this where it could not be discovered who was the rogue; on the principle, "that one innocent person ought not to be relieved at the expence of another" (a moral principle) & Such Discussion would have a tendency to impede the progress of Commerce by making men afraid to take money.

Where Money may be tendered.

If a place is fixed upon, where the money is to be paid, there it must be tendered. The general rule is that if no place is agreed upon, it must be tendered to the creditor's person, or in his absence to his agent & if neither creditor nor agent can be found, the being ready to pay is as effectual as a tender. In case of a Mortgage a tender at the House of the Mortgagee is sufficient. A tender made when the money is loaned is a good tender sometimes. Paymt. proposed to be made at a particular place & no objection made by the creditor, tender at this place is good. In case a tender by a tenant at the House or the land from whence the rent issues is sufficient.

Tender of Cumbrous Articles in some respects different from the tender of Money. If a place is fixed upon, no doubt. If no place is agreed upon the general rule is to tender where the creditor lived when contract was made, or some other place as convenient for the debtor; but if the debtor is requested to make delivery at a certain place imposing no greater duty upon him than the terms of the original contract, he must tender there.

Contracts

There are instances where the place of paym.t is always fixed without mentioning any particular place as in case of due bills issuing from a Merchants Store.

The time of tendering.

A man promises to pay on or before such a day— Can tender be good before that day? It may, & it may not be good— If the creditor was, at home at any day of this intervening time, a tender would be good— but a tender at his house would not be good, if not personal— When the day of paym.t arrives, a tender of the debt at that day is good. The tender must be made at the uttermost convenient part of the day— this critical part of the day is adjudged to be at such time that the money may be counted by day light— If the creditor was at home, any time in the day would do— If the place is fixed & no time, the debtor may give notice at what day he will pay the debt & a tender on that day is sufficient— In case of negotiable notes who is the money to be tendered to? If the debtor knows nothing of the assignment it must be to the original creditor. But the last assignee may appoint any place not more inconvenient for the

Contracts

Debtor shall the terms of the original agreemt. —

Authorities for the Subject of Tender —

Coke Litt.	2.	7 Rep.	13.	Plowd.	173.
Dº	6.	Latch	70.	Dº	172.
Dº	7.	3 Lev.	104.	Cro. Eliz.	714.
Dº	208.	5 Rep.	115.	1 Vent.	211.
Dº	209.	2 Phm.	373.	Cro. Eliz.	715.
Dº	210.	Roll	513.		
Dº	211.				

5th 15th And last defence against Contracts —

Of the Statute of Frauds & Perjuries —

The Statute of frauds & perjuries is pleadable, as a defence, only against parol contracts.

It is unnecessary for a man to state in his declaration that the contract he founds his action upon it in writing — it is the Deft's business to plead that it was not in writing & prove this — The general rule is where the action was brot upon the writing for the declaration to count upon the writing — if not the defendant may demur — There are 5 Branches to the Statute of frauds & perjuries — 1st That no suit in Law or equity shall be brot upon any contract to charge an Executor or administrator upon any special promise to answer damages out of his own estate, — 2ndly Or to charge the Deft upon any

promise to answer for another person. Or 3rd to charge any person upon a contract made in consideration of Marriage. Or 4th Upon any promise relating to the sale of Lands, tenements, hereditaments or any interest concerning them. Or 5th* Upon any contract that was not to be performed within a year from the time of making it — unless the agreement upon which such action shall be brot, or some memorandum or note concerning it shall be made & signed by the party to be charged or some person authorized by him — Of these in their Order

1st Executors & Admrs in their respective capacities are not bound by their parol promises where there are not assets sufficient to fulfil those promises. If however the assets of the testator are sufficient to satisfy all the debts such parol promises are binding —

2nd No person shall be bound by a parol promise to discharge the debt of another person — This branch has been the occasion of some dispute — which has given rise to a distinction when a person is & when he is not bound by a promise for another — If the promise be original, it is taken out of the Statute & is bind-

* N.B. Our Statute of Limitations 21 Jac. 1. c. 16. extends to Simple Contracts as well as Specialties. It bars actions upon Contracts after 6 years from the time of the promise made.

ing — if the promise be Collateral it is within the Stat. consequently void — Original means where the promisor brings the debt completely upon himself & frees the first promisor — As A. has a note against B. — C. a third person steps in & tells A. to burn the note, & he will pay the debt — in this case the 2 promisor takes the debt completely upon himself — Collateral, means where the promise of the 2nd person only comes in aid of the first promise — As if C. tells B. if A. won't pay the debt he (C.) will. [See 3 Burrow 1888. Cowper case of Leppet & Williams — If C. should say to B. release the property (taken in security) to A. and I will pay the debt" here C. would be bound for he was the occasion of B's giving up his lien upon A's property. 1 Wilson 305. 3 Burrow 1888: Wms vs Leper.

A Parol promise in consideration of marriage is good for nothing — As if a Father should promise a man to give his daughter the sum of 1000£ in consideration of his marrying her — this promise is good for nothing, unless reduced to writing — Tho' any hints of such an intention in writing would make the promise binding —

As if a Father should write a Letter to his daughter informing her he would give her the 1000£ if she would marry such a person & this person could make it appear that he saw the Letter before he married the daughter, this would be sufficient to bind the Father =

1st. Any parol promise relating to Lands tenements &c are within the Stat. void — A man who enters upon Land under a parol lease cannot be dealt with as a trespasser. tho while he stays there he is answerable for quantum oportet. Many Cases which were formerly within the Statute of frauds & perjuries have been taken out by Courts — Chancery first ventured to strike the blow, & Courts of Law have followed their example — As when a contract is executed on one part, Chancery will order a specific execution of it — & at Law damages may be obtained for nonperformance. Here Courts of Law have sustained actions of this kind =

Contracts

5. 29 Car. 2 Parol Contracts not to be performed with[in] a year are void. — Contracts ~~&c~~ which from their nature could ~~not~~ be performed within a year, if no time is specified, they are not within the Statute — Lands sold at Public auction are not within the Statute tho' not reduced to writing — Memorandum signed by the party charged with[it] — it is immaterial whereabout upon the paper the name is written — But if it appears pretty evidently that the Signer had no intention to be holden, as a general rule, he shall not — In some Cases a man is bound altho' he does not sign the writing — if signed by the adverse party at the procurement of the other party — As if a man engages to do a certain act for me & I in return am to do a certain act for him — we reduce the promise to writing & he signs the memorandum & I am to keep it — the promise on my part is equally binding with his.

Remark that an action on such a agreem[t] to be performed within a year, or which might be performed within a year according to the natural course of things, will be sustained three years after such agreem[t] made, but not after this by our Statute

Of the Estate of a deceased person

Chapter 1st

Principles of the English Law on the Real & Personal estates of Deceased persons.

The Law of Eng. respecting the management of the Real property of a deceased person is different from the Law respecting personal property. The real vests immediately in the heir, & the personal in the Administrator. Real estate in the hands of the heir, is not liable to creditors unless for particular kind of debts when the Decear has bound his heir by a special writing under seal. For any but specialty debts the real property is not to be broached by any remedy either in Law or Chancery. If the heir has once redeemed the land by discharging the specialty debts, that land is afterwards liable to no creditors. At Com. Law the heir might sell the lands immediately upon the death of the intestate & not be liable to pay specialty debts. In this situation a wide door was open for injustice & imposition; but a Stat. intervened in the reign of Wm & Mary, making the heir liable to the specialty creditors if he sold the Real Estate. The real property is not the only fund for the discharge of specialty debts. The personal estate in the hands of the

Estate of Dead Persons

Administrator may be resorted to by the Specialty creditors if they please - Specialty Creditors may take personal property in preference to simple contract creditors - We will suppose a man died worth 1000£ - 500£ real & 500£ personal property - owing 500£ by bond & 250 by simple contract. The specialty creditor may resort to the real or personal fund - if to the personal, he may exhaust this fund & thus exclude the simple contract creditor from a recovery. If the creditor by bond had taken only 250£ from the personal estate & then resorted to the real fund for the residue, the Creditor by simple contract would have recovered his whole debt. But by ~~taking~~ exhausting the personal fund he leaves the simple contract creditor ~~at~~ Law remediless - Observing the manifest injustice of these principles Courts of Chancery have interfered, & tho' they have not entirely overthrown the system, they have acknowledged its absurdity & afforded a partial relief - If Specialty creditors have exhausted the personal property, Chancery will let in & have not broached the real, Chancery will let in the simple contract creditors upon the real property (paid out of the personalty) to the amount of the Specialty debts, but no farther. Thus in the case supposed above if

Specialty debts to 500£ - Sale of land is stated by Chancellor as if 500£ only - It is considered as after personalty exhausted by specialty creditors

Estate of Dec^d Persons

the personal fund was exhausted by specialty creditors, the simple contract creditors would by application to chancery stand in the place of creditors by bond & exhaust the whole real fund viz. 500£. — If there had been no specialty debts & no personal estate the simple-contract creditors could not have taken hold of the realty, but would have been without remedy. When real property is laid open to simple contract creditors there is no priority of rank among them by applying first or otherwise. — & if specialty debts do not amount to enough to satisfy simple contract creds. taken out of the personal fund Chancery will average it among them. —

Of the Personal estate.

Personal estate of the Dec^d is consid^d. As effects in the hands of the Admin^r istrator, to pay all debts to the extent of those assets, & no further. Debts are to be paid according to a certain rank, the administrator must observe this, or he can not protect himself against claims of a prior rank. Amongst creditors of equal rank there is no average, — the administrator may prefer whom he pleases unless by legal diligence one creditor has gained a priority, by instituting his suit & obtaining judgement first. He has not the priority who institutes his suit first but he who

obtains judgement, first. If the administrator becomes Bankrupt & squanders away the assets, as he is obliged to give Bonds, the Creditor may resort to the Bondsman to the extent of the bond. If an executor becomes Bankrupt there is no bond to resort to, unless such Executor has been compelled to procure bonds. But if either administrator or executor has proceeded to pay legatees or distribute the estate among the Representatives, such estate may be in Equity pursued by creditors, or they may come upon the Administrator & he in his turn may compel the Legatees to refund to the extent of the debt.

Assets in Law & Assets in Equity.

There are assets in Equity, which are not so in Law. Equities of redemption ~~are not~~ were not [illegible] Sel. Ca. Rep. 662. assets in Law, tho' they are in Equity. By applying to Chancery Creditors may obtain a decree for the Sale of Equitable assetts & their avails will be averaged among the Creditors with no regard to priority of rank. There are some cases where there is no other way to get at property, but by application to Chancery, if this property when obtained consists of legal assetts Chancery will distribute it according

to priority of rank, as a Court of Law would.
Altho the Real estate is not generally the fund for the payment of debts, yet the Testator may charge his Lands with the payment of his debts in a variety of ways. He may empower the executor to sell the lands & his deed is valid — if however in such case he refuses to sell he may be compelled by Chancery. The Testator may give the Lands to the executor to sell & pay debts which vests a fee in the executor & renders him liable to creditors to the value of the land unless he sell it. The Testator may also devise to a certain person with the incumbrance of paying certain debts. If the devisee accepts of this devise on this condition he is liable to the extent of the debts with which the lands are charged, if he declines to accept, the land devolves to the heir & he is liable to creditors to the extent of the value of the land —

Lands ordered by Testator to be sold for purposes are not assets in the hands of the executor but in the hands of the devisee they are assets.

The testator cannot release his estate from its liability to pay specialty debts. — A Reversion is reckoned among the assets. There is one species of reversion however not assets as where

* Either real or personal property is given charged with debts
* The person and property is liable for the debts, if both charged, the creditors may compel him or the executor may come on the Estate & then the Ex^r may take the land of the devisee

Lands.

an estate tail is given on failure of the grantee's issue to revert to the heir this would not be consid^d assets on account of its uncertainty & its being liable to be cut off by sale yet when the line in tail should fail soon & the estate should revert to the heir, it would be assets in his hands— Choses in action are assets, but the Administrator is not liable to pay till they are recoverable judgm^t must be quando accederunt. granted against him

All the profits of the personal estate are in the hands of the executor & are assets, as a lease for years all the profits above the rent are assets at the end of one year after the Testators death— after the first year executors must pay interest for unpaid legacies All the interest of the Testators intestates money is assets Damages also recovered for an injury in the intestate's life or afterwards— Goods lost by accident without any neglect on the part of the executor are not assets. Goods held by the Testator as Trustee for another are not assets in the hands of the executor. An estate of a Cestuy que trust is not legal assets in the hands of his executor, but equitable. An assigned bond is not assets.

Duty of Administrators & Executors

After burying the Decead & proving the will &c they must first pay off all the Debts with the

assets. If any are left after discharging debts the administrator must distribute it among the representatives &c of the Decd according to Stat. of Charles 2nd. This estate vests in the representative immediately on the death of the Decd before distribution so that if such representative should die before distribn the property would go to his Representative. The duty of the executr after discharging debts is to observe if any Legacies are due. He must see whether the Legacies are Specific or Pecuniary Specific is where a particular article is marked out as a horse or an op &c. Pecuniary is a sum of money. If there still should be a Residuum he must observe whether the is a residuary Legatee & if so pay the residuum to him. But in case of no Residuary Legatee. Where shall the estate go? Formerly the executor was accountable to nobody for the residuum, it devolving to him by virtue of his executorship, for the presumption was that the Testator had made provision for all he wished to. But now if the executor has a Legacy he has nothing to do with the residuum, he is the trustee of the next of kin for the residuary sum. If however the Legacy does not appear to have been given for his trouble as a ny &c it will not deprive

him of the residuum - But where there is sufficient on the face of the will, by means of a competent Legacy or expression to be for his trouble to imply that the executor should not have the residue he shall be trustee to the next of kin - Chancery will admit parol proof to shew that the Testator desired the executor should have the residuum notwithstanding the Legacy. 1 Wills. 313. Lowndes in Lane endeavors to account for this otherwise than by considering it as an exception to the general rule of admission of testimony, but notwithstanding all they have said it must be carried as an exception. But they will not let in parol testimony to shew that the Testator meant the executor should not have the residuum where there has been no legacy given him.

1 Mer. 9. 550. 3 Mer. 40 Strange 568. Cro. Eliz. 162. 91. 2 Atk. 226 220 Cro. Eliz 27. There are Authorities for the Contrary Case -

It is a rule in Chancery that parol proof may be admitted to rebutt an Equity & court an implication of Law; which mean the same thing. If a Debtor be made executor it is said his debt is extinguished, but it is in fact only a release of the action & he is accountable to the Creditors to the extent of the Debt unless there be a residuum - The reason given why the action is released is not the true reason - the reason offered is "That an Executor cannot sue himself" for it would be no more absurd than for an Administrator to sue himself when he is a debtor to the Dec.

8 Cok. 136. 1 Roll 934. 1 Vern. 160 Cro. Car. 372. Rowden 186.

Vid 79. Walk. 306. It was never intended that the action was released in the last case; the executors debt is released to him where there is a residuum as being due to him according to the Old Law, & should a Legacy be given him & still a residuum, he would be obliged to distribute the value of the debt among the next of kin. An administrator may be a witness in any action concerning the Estate of the dec^d on the ground that he is trustee to the next of kin - But an executor, tho' acknowledged to be a trustee, cannot be a Witness, because it is said having a right to the residuum he is interested - In Com. he is consid^d as a Legatee as well as a Trustee.

Lect 9. One case under Equitable assets was omitted in the last Lecture - if a man devise Land to an indifferent person in trust to be sold for the payment of his debts, such Lands are consid^d Equitable & not legal Assets. Had they been thus devised to an executor they would by priority of right have been legal Assets - In case the Devisee will not sell the Lands Chancery will compel him & then there is no priority in rank as to creditors, the assets would be arranged - But if the Devisee sells the Land voluntarily & applies it to the payment of debts, there is no Law compelling him to observe any priority - he may pay Mr Reeve's Simple contract Creditors as soon as Specialty

Duty of an Executor as it respects Legacies.

There are 2 kinds of Legacies Viz. Specific & Pecuniary — If there is not personal property sufficient to pay off Pecuniary Legacies they are abated proportionably — But Specific Legacies are never abated they being of such a nature that it would be improper to abate them & sometimes impossible — Legacies are frequently given by implication — The intentions of the Testator is to rule when it can be discovered ~~without~~ & it is not necessary to observe a stipd set of words — "I desire" or "I request &c." are sufficient to establish a Legacy; or "I bequeath besides my cloak a hat &c" the cloak is a Legacy tho' not mentioned any where else in the will. When Specialty creditors have exhausted the personal estate, Legatees may fall upon the realty as we have seen simple-contract creditors might — if lands are devised for the payment of all debts & Creditors have exhausted the personal estate Legatees may stand in the place of Creditors, for where lands are devised for the payment of debts, it is presumable the Testator meant the Legacies should be paid out of the personalty. Salk. 316. 3 P. Wms. 322.

There is a further division of Legacies into Lapsed & vested. A Legacy is said to be Lapsed when the Legatee dies before the Testator etc. The Sharpe 820. Legacy is not transmissible to the Representa- 2 P.W. 86. tive of the Legatee, but vests back into the personal fund & if there is a residuary Legatee it vests in him otherwise it is undisposed of & the Testator dies intestate as to such Legacy. Legacies however are not always lapsed when the Legatee dies before the Testator. A Legacy 3 Atk. to one "to be paid when he attains the age of 203. 21 years" is not lapsed tho' the Legatee die before that time. This is a vested Legacy & will go to the Representative of the Legatee in case he dies. If however the Legacy had been given to one when he attains, or if he attains 21 (without the words "to be paid") & the Legatee dies before that time it is a lapsed Legacy. But if a Legacy is given to one when he attains 21 & directed to be on interest, it is a vested Legacy. This nice distinction was taken from the civil Law, introduced into Eng. by the Ecclesiastical Courts, & adopted in Chancery only on account of its connection with the Ecclesiastical Court. Many circumstances unite to shew that Chancery is not pleased with this distinction.

If a Legacy is charged upon land tho' the words are "to be paid at the age of 21" yet if the Legatee dies before that time it is a lapsed Legacy. In other instances Chancery has varied from this distinction — When it can be collected from the words of the will that independent of those terms "to be paid" &c that the testator meant the Legacy should go to the Legatee, it is vested, as if the Legacy be given with interest at 21 &c. Thus where it is given over on the event of the death of the Legatee it is a vested Legacy. — It has been a great Question whether a repetition of the same Legacy should be construed an accumulation or a mere repetition? The rule now is established "That where the Testator devises a Legacy of 100£ to Jms. & in the same will, to the same person & in totidem verbis devises another 100£ it shall be considered a repetition merely & the Legatee shall have only 100£. the presumption being that it was a mistake of the Testator or Scrivener. But if 100£ is given to a man in the will & another 100£ in a different instrument as a Codicil, it is not considered a mere repetition, but 200£ will pass to the Legatee. If it is evident by the words of the testator that he designed the Legatee should have both as if after the 1st he should say "for the further provision" &c both good.

2 Atk. 32
3 Wm 11
2 Wm 610

1 Brown Chan. 6
38

Estate of Decd Persons

If different sums are bequeathed it is not they are not consid: the same bequest, but both good. & if 1000 £ is given in timber, another in Cattle, another in Land &c they are all good.

It was formerly held that when a man gave a legacy to a creditor the legacy should go in satisfaction of the debt. Judges have refined so far upon this principle that it is at length refined to nothing & an opposite principle is established in its room. We will give a slight sketch of the progress of this reformation. A Century ago it was an established maxim in Chancery that if the Testator was indebted to a man 100 £ for instt & in his will devised him a legacy of 100 £, this was to be in satisfaction of the debt - going upon the presumption that the testator must mean it as a paymt of the debt. Many cases were decided under this maxim & it was carried to an unwarrantable length in the case of Cranmer, where the debt was contracted subsequent to the making of the will - the legacy was held to discharge it: Another circumstance that gave rise to this construction was that where a man covenanted to settle a portion on his intended wife & afterwards devised her a portion to the same amount, both portions could not hold it being fairly presumed that the Testator had performed his covenant.

The Chancellors not relishing this rule laid hold of every circumstance to evade it.

The first case in which they attempted to break in upon the rule was where a Legacy was given to a Creditor of a greater sum than the debt due to be paid in a different species of property from the debt. To evade the rule in this case the Chancellor presumed the Legacy could not be intended as a Satisfaction of the debt, it being of a higher value & not ejusdem generis. Several cases were determined under this principle — A case soon arose where the Legacy was of the same amount with the debt & ejusdem generis, the debt however was payable 6 months before the Legacy. This circumstance was laid hold of & it was presumed by the Chancellor that the Testator designed the debt should be first discharged & the Legatee entitled to the Legacy.

A 3.d Case came up where the Legacy was to the same amount, ejusdem generis, & payable at the same time. It is curious to observe how Chancellors have ~~cracked~~ racked their inventions to evade an absurd maxim which might have been broken up at once without all those plausible pretences. The Chancellor in this case had recourse to the common expressions in the will, "after all my just debts are paid" he concluded

that this debt should be paid amongst others & after this the Legacy ought to be paid.

~~Bracketing & Interlineations~~

A case afterwards came up in which the legacy was payable at the same time with the debt & to the same amount, & there was no clause "after all my just debts are paid" But the Legacy happened to be given to a bastard & "mirabile dictu" the Chancellor observed that "as there was no precedent relative to bastards" he should be governed by them & thus was the rule evaded.

Another case came up stripped of every circumstance that had heretofore been laid hold of. In this instance the Chancellor took into the ridiculous restraint which had so long fettered former Chancellors & boldly declared that unless something positive could be found in the intention of the Testator that the Legacy should go in satisfaction of the debt, the Legatee should be entitled to both sums. And in order completely to destroy the rule, the Chancellor in another case declared that unless direct expressions were made use of by the Testator, that the Legacy should go in satisfaction of the debt, it shall be presumed that he meant to make further provision for the legatee. Our Courts have determined in favor of the Legatee. One curious case

came before our Court is ~~think all the~~
are attended with all the circumstances
which had been laid hold of by the English
Chancellors. A man gave a legacy to his bas
tard daughter & before that he had given her
a deed note of the same sum & she took both.

Authorities for the above history —

1. Pr Wms 410. } 2 Atk. 300 } 1 Jersey - 524. } 2 Eq. Cases Abr. 526. decis
2. Pr Wms 606. } 3 Do 96 } 10 Brown 129. } from Ld Talbot which was not
2. Do 513. } 2 Jersey 409. } Do 235. } carrying interest unless
3. Do 297. } 2 Do 630. } Do 125. } made for the benefit
Do 319. } of the Legatee
Sheriff Hoskins
The principal question is whether a Legacy
comes due it is to carry interest or whether it is to carry
interest in the terms of the contract or not
A Legacy given payable at a future time is not to
be consid. on interest till it is due & not then unless
demanded by the Legatee. Salk 415. This is a gen-
eral rule liable to an exception. As if a minor
has a legacy given him by his Parent, notwith
standing it may be expressed in the will pay-
able at a future time, it is to carry interest
from the death of the Testator unless other pro-
vision is made in the will for the minor's main-
tenance. The interest is to be consid. a provision
for the child till he comes of age, unless other
provision is made. This however is not the case
with a Legacy from a Grandparent. 2 Vent 316.
2 Atk. 329. 3 Atk. 101.

Where no time is limited
In case of a legacy & no time specified this dis
tinction obtains between infants & Adults.

Estate of Deceas^d Persons

Viz: a legacy to an infant is to begin to carry interest in a year after the Testators death whether it is then demanded or not; but a Legacy to an adult is to carry interest after a year provided he demand it at the years end otherwise not till demanded & as the case may be, not till a bill is filed by him in Chancery.

To these principles there are exceptions. When a legacy is of such a nature as to carry interest of itself it must carry interest from the death of the Testator, let it be given to whom it may, demanded or not demanded as bond debts &c that are upon interest, or a legacy charged upon lands upon which rents & profits are arising in all such cases the Legatee is to receive interest. — In 3 P. Wms 126 is a case where an infant daughter had a legacy given her by her parent payable on her marriage & no other provision was made for her, she married & her husband being ignorant of the Law took interest only from the time of marriage & executed a release of all demands for the Legacy & afterwards filed a bill in Equity & obtained interest from the death of the testator on the principle laid down above. This is a striking instance among many others where ignorance of the Law will suffer may be an excuse & is a ground for avoiding a contract — 1 Vern Chandry

Where notes are given payable at a certain time they carry interest from that time without demand. This by Decision Sep.^r Court

Estate of Dec'd Persons

the sacred maxim of the Eng. Law "That ignorance of the Laws shall excuse no man". What becomes of the interest which the legatee is not entitled to by reason of his failure of demanding the Legacy? If there is a residuary legatee he takes it. If no residuary the Executor will take it as residuary Legatee in case no legacy is left him. But if a legacy is left him, it sinks into the fund of undisposed property & as to that the Dec'd is intestate. Of Specific & Pecuniary legacies. The first is where a particular article is specified as such a horse, such a bank bill &c and may be a quantity of money in such a draw there must always be a particular thing specified with a particular description. A Pecuniary legacy is where a sum of money is bequeathed generally. As to the executors right over the legacy it makes no difference whether the legacy is specific or pecuniary. The specific legacy does not vest in the legatee unless with the consent of the Executor, but when the Assets are sufficient to pay other debts, the executor is accountable to the specific legatee for the value of the legacy. If the executor is sued for a debt of the Testator & a specific legacy is taken & sold for the debt, the executor is accountable to such legatee for the value of the legacy in preference to pecuniary Legatees. When all the Assets

Estate of Dec'd Person

are exhausted for debts & the Executor, being called upon by a Legatee, pleads plene administravit, if the Legatee wishes to prosecute the Executr for misconduct as wasting the Estate, he will reply over to the executor's plea a Devastavit & must prove this he may then recover his legacy if the waste was as much as the legacy, if not as much as the waste to the extent of the waste. Suppose the Executor has made no waste, but Specialty creditors have taken possession & exhausted the personal fund the Legatees then stand in the place of creditors & if the heir has lands may come upon them to the extent of the Specialty debts. After debts are paid Specific legacies hold the preference to the pecuniary & are to be paid at all events after the Specific are distributed, & there is not sufficient property left to discharge the pecuniary, what there is remaining is to be averaged among the pecuniary Legatees. But among Specific Legatees there is no abatement. Tho some authorities may seem to contradict this idea, yet it is the general principle that is to be collected from the Books. 10 Mm 122 If a Specific legacy is lost, it is the loss of the Legatee & he has no demand upon any other property for it, tho there should be more than sufficient to discharge all

the debts of the Testator — The pecuniary legatee runs no great risk, for if a house is burnt up & a quantity of money with it, if there is other assets sufficient he meets with no loss — This hazard of the Specific legatee is one reason why, in other respects he holds preference to the pecuniary. A devise of land is a Specific Legatee, Specialty and as the case may be simple-contract creditors may on failure of other property come upon such land legacy — but another Legatee cannot. Cases may happen where Legatees may come upon the heir for their legacies but they cannot upon a Specific Legatee of Land. If however all the landed property is thus devised, the Devisee is liable, as well as the heir in other cases — 5 Atk 505. There is one case the peculiar circumstances of which suffer the pecuniary legatee to have preference to Specific — viz. A man gives all his property in legacies specific & then gives to another person 500£ for inst. This pecuniary Legacy of 500£ is consid.d as charged upon the Specific Legacies & the Specific Legatees must bear the burden equally — The principle of giving the preference to Specific Legatees may do great injustice & defeat the intention of the Testa-

as if a man supposing his estate larger than in fact it was should give his children large legacies & then give specific legacies to other persons. Unexpected debts come in & take away from the executor all the property except the specific Legacies. In this case the children of the Testator might be left destitute & contrary to the his intention the residuum of the estate go to indifferent persons. Where by the Executors consent a specific legacy is vested in the Legatee & unexpected debts come in & there is no estate left to discharge them, what in such case shall be done? if the Executr when he gave up the legacy took a security of the Legatee to refund in case of unknown debts (as he ought) then the legacy is to discharge the debt, otherwise the Executor is to pay it out of his own pocket but if the Executor had in all other respects faithfully executed his trust this would be a hard case, it would seem reasonable that the legatee should yet refund notwithstanding the executors neglect in not taking a security. If the executor pays in full a pecuniary legacy & thinking there was property sufficient to pay all other debts & legacies & there happens not to be sufficient the Creditor or as the case may be the legatee must first resort to the ordinary channel the exec

utor & if he is insolvent they may pursue the Assets ~~whereever~~ in the hands of the Legatee that has been paid. The Creditor may compel him to refund ~~wholly~~ the whole Legacy if his debt amounts to it, & the other Legatee may compel him to average. 2 Vesey 193. If the executor is able (however unjust it may appear) he must in Strictness bear the Loss, but if he is insolvent, the principle is That the Creditor may resort to Assets wherever he finds them unless in the hands of ~~an equal~~ creditors of an equal or prior rank. There is a case in 2 Vernon 203 where Lee. M. an executor having taken all possible precaution before he paid the Legacy, was not excused from paying a debt which came in afterwards.

It is a principle in English Law that where an executor has abused the trust reposed in him by the Testator by making unequal & unjust distribution, Chancery will interfere & compel an equal distribution. As where 100£ was bequeathed to 2 persons & as much as the executor thought fit to a 3rd person. The estate held out & the executor thought fit to give this person nothing; but was compelled in Equity to give the 3rd person 100£ as much as both the others had. Where a Legacy is given to a man's children there has been great dispute

whether it meant 'to all the children the man had & shall have' or 'to those which he has when the will is made' or 'to those which shall be alive at the Testator's death'. It is now established that such expression shall mean "to those children only which are born at the time as those are the only ones in existence at the time the will was made, with whom the Testator could be supposed to be acquainted. 1 Vesy 57. If the bequest is to a man's children & he has none at the time the will was made, it means to all the children he shall ever have — if to 2 men's children & one of them has no children at the time it means to all the children of both equally. — A Legacy to a child is sometimes construed to mean to a Grandchild. As if a Legacy be given to A's children & A is a widower & has no children, it may go to his Grandchildren. — An Estate Legacy given to B. for life with a remainder to the heir of S.S. who when the will was made was C. & C. died before the Testator. Then D became heir to S.S. It has been an important question whether the Representative of C should take the Estate or D. Whatever it may be as to D, it ought to be consid^d as a lapsed Legacy with respect to C.

Where a Legacy is given by a Testator "to his relations", there has been some doubt what

relations shall have the benefit of Just. Legacy? but it is now determined that those only shall take who are authorized under the Statute of Distributions. 2 Vesey 527.

In a general devise of Personal Propt. that which is acquired after the making of the will may pass to the Legatee. This however is not the case with real property. When all the personal property at a particular place is bequeathed under such bequest all the property passes which was at that place at the Decease of the Testator, unless it can be gathered from some circumstances that the intention of the Testator did not extend to a particular article. As where a man bequeathed "all his goods, chattels, furniture & such things" on such a farm" There happened to be a large sum of money in a drawer in a house on the farm & this was said not be included in the legacy, as the Testator went on to specify the articles & had not mentioned this most important of all.

What may be consid.d an ademption of a legacy?

This is a Question that chiefly respects Specific legacies. In case a bond is

given by a Testator & is collected by him before his death, this may or it may not be considered an ademption as the circumstances of the case are, — if it appears that the Testator at the time he collected the bond was shortened for money, or if the obligor was like to become a Bankrupt, or if the Bond was discharged voluntarily by the obligor neither of these cases would be consid^d an ademption of the Legacy. But if it can be collected from any act of the Testator that he meant when he took up the bond that the Legacy should be destroyed, such it would be an ademption.

If the house had been destroyed by a new one built on the old ground it would be an ademption but it was repaired it might be considered as the same house.

There is another set of cases where legacies are said to be ademed. When Specific Legacies are lost they are the loss of the Legatees & the legatees have no demand on the estate to make up for this loss. There is a curious instance mentioned in the Books where a house was devised & before Testator died it was so repaired that there was no part of that house to be found which was given at the time the will was made. There does not appear to have been any decision in this case tho' from a principle laid down by the judge in a succeeding case it may be discovered

that the house would not have passed to the Legatee. This was the case of a vessel which was (after the will was made) repaired so that nothing but the Keel remained. The Keel saved the Legacy. The judges easily identified the vessel by means of the old Keel. tho' had it not been for this, they said the Legacy would have been lost. A Legacy of a mill, tho' it had been all repaired away, would pass for the Court might easily indentify it if there was not an atom of the old mill left.

Legacies may be adeemed where there is no loss as when a Testator in his will made provision for persons, & unexpectedly living long after made the same provision in his Life time for those persons as he had mentioned made in the will. This however might not be consid^d as an ademption, if the Testator had increased his property after the will was made & it appeared that he was fully able to make this after provision besides the provision in the will. Adjudications in such cases are meant to comport as much as possible with the intention of the Testator.

Legacies are frequently given with some condition & this is generally respecting marriage. As if a person marry with the consent

of parents" or "if she does not marry a man of a particular profession" as a Lawyer, a Priest &c such conditions are almost universally considered void as being against Policy & unreasonable. There is only one exception as where a husband gives his wife a Legacy on condition that she does not marry. The reason why the law is so indulgent in this case is that the husband's children may not be so likely to be taken proper care of in another family. When however this reason ceases, when the husband has no children such legacy would cease tho' she should marry. The Testator's whim is sometimes indulged where it is of trifling importance, as if he gives a legacy to a girl on condition that she does not marry in York for it would be easy for her to go out of York & marry; but all restraints where the interest of Society is in any way concerned are void.

~~A Legacy to A limited over to B. on A's marriage is forfeited by his marriage & will go to B.~~

When an executor has a legacy in his hands for a minor, he must not give it up to Parent or Guardian unless by rule of Court if he does deliver it up to Parent or Guardian

A legacy given to a girl provided she marries with the consent of her parents is void, but if it is coupled with a restraint to marry without his consent such condition is void only as to him and not to another in case she marry without his consent.

without leave of Court he is liable to pay it over again in case the Parent &c should happen to be Bankrupts. The Executor may be compelled by Chancery to deliver up the Legacy to the Guardian &c but unless by leave of Court he ought to keep it till the minor comes of age 1 Ppr 283. If a vested legacy is given & the Legatee dies before 21. Question Ought the executor to pay the Legacy before the Legatee would have arrived at 21? He ought not unless the Legatee had children whom it was necessary to support or in some such peculiar case. A vested Legacy given to A. and on his death to B. If A. married or unmarried arrived at 21 & died after that B would be excluded it would go to A's representative but if A had died before 21 married unmarried then it would have gone to B. Lec. 12.

Formerly Legacies were recovered in Ecclesiastical Courts, but now the Court of Chancery has a concurrent jurisdiction with them & in some respects the

jurisdiction of Equity is more extensive than that of the ecclesiastical Courts. As where a Legacy is given in Land the ecclesiastic Courts have no cognizance these cases are the province of Chancery. Co. Jac. 364. 279. Parmor 120. Co. Car. 16. Courts of Law have cognizance sometimes over a certain description of Legacies. As where Lands are devised to A. & a Legacy is charged upon it for B. 2 Salk. 415. 2d Raym. 917.

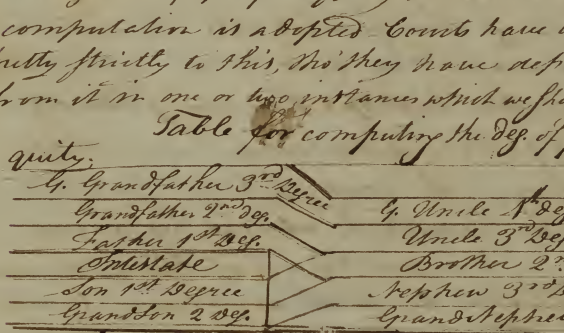
Of the Statute of Distributions made in the Reign of Charles 2nd

The principles in this Stat. will apply to all the United States & if understood, will lay a foundation for a complete knowledge of the Distribution of the Estates of intestates. Anciently in Eng. the method was to divide the Estate into 3 parts a rationabilis pars to the widow & another

to the children. The residue was taken by the ordinary (who then administers) for the good of the poor, the Church & the soul of the intestate without liability to account for the management of it. Thus the Romish Hypocrisy Clergy took a third of every intestate's estate without ever paying the lawful debts. To check those enormities several Statutes were made abridging their powers, till finally the administration was taken out of their hands. The Bishops however still appointed Administrators but were obliged to appoint the next of kin. The Administrator frequently abused his power & there was a great part of the estate over which by determination of Courts he had uncontrolable power. This gave rise to the Stat. of Car. 2. which is no more than a revival of the old Saxon Law. This Stat. regulates the distribution of the surplusage of intestates' estates. 2/3 to them - 1/3 must go to the widow if there are children & 1/2 to her if there are no children & the other 1/2

to the next of kin or their representatives. If there is no widow the whole must go to the children or their lineal descendants ad infinitum. If neither children nor widow the whole must be distributed among the next of kin in equal degree & their representatives none presentatives being admitted among collaterals further than the children of the brothers & sisters of the intestate. In computing the degrees of propinquity the civil law computation is adopted. Courts have adhered pretty strictly to this, tho' they have departed from it in one or two instances which we shall mention.

Table for computing the deg. of propinquity.



If there were two Brothers & one died leaving children, the children stand up with the living brother & take per stirpes what their father would have taken. Both brothers dead leaving children, they no longer take by representation, but in their own right & the Uncles in the 3d Deg. will take with them per Capita. Grandfather & Brothers do not take equally

* see over Leaf for the 8 first questions —

Same Relatives, only one Brother dead leaving childn

ans. His childn take per Stirpes —

9. All the Brothers are dead leaving childn in unequal numbers.

ans. The G. Father takes the whole

11. The Grand Father is dead & Aunt living

ans. The Aunt & Nephews take equally —

12. One of the Nephews dead leaving childn

ans. The Aunt & the surviving nephews take equally & the G. Nephews being beyond the 3 degree take none

13. All the Nephews dead leaving childn

ans. The Aunt takes the whole —

14. G. Father again alive

ans. He takes the whole —

15. G. Father dead & Aunt dead leaving childn

ans. Her Childn & the Nephews' childn take equally per capita —

16. The Mother is living & Nephews

ans. The Mother is kept down to the 2d degree & consid.d as the old Stock, that the Nephews may take per Stirpes what their respective parents would have taken —

17. The Aunt is alive

ans. The Distribution as before — She takes nothing —

18. No Relations but Nephews & some of them & the half blood

ans. All take per Capita

Finis

Cases determined by the Law of distributions Personal Estate

Quer. 1. J. S. died intestate leaving childn Tom, Dick & Sally

Ans. Tom Dick & Sally take equally

Quest 2nd Tom is dead leaving Son A. Daught B

Ans. A & B. take per stirpes what their Fath would have taken

Quer. 3. Tom Dick & Sally are dead- Tom's chil as before, Dick left C. & Sally D. E. F.

Ans. All the Childn take equally per capit

Quest. 4. Not only Tom is dead, but his Son A leaving G. & H.

Ans. G & H take per stirpes what their Fa A would have taken.

Quest 5. There are no childn but a Father, t ther & 3 Brothers

Ans. The Father takes the whole

Quest. 6. The Father is dead of Con 2

Ans. The Mother by the Stat. would take whole, but the Stat. of Jac. has degraded h from her rank to the 2d degree that the Bro may share equally with her

Quest. 7. J. S's Grand Father is living

Ans. By Stat. he would share with the Bro. but he is excluded by Courts so that the d tribution is as before

Quest. 8. Same relatives, but the mother is de.

Ans. The Brothers take equally

In this case the Grandfather is excluded by Courts, tho' contrary to the Stat. of Car. By this Stat. if the father was dead his wife would take to the exclusion of Brothers & Sisters. Finding that this would frequently carry the estate of the intestate into other families by her marriage

The Statute of James steps in & degrades her from her rank to the 2nd degree & suffers the Brothers & Sisters to take with her but as soon as the Brothers & Sisters are dead she is said to resume her rank, this however is only to the exclusion of the Grandfather, & grandchild for she is by the decisions of Court kept down to the 2nd degree when the brothers are dead & consid as the old stock that the children of the brothers may take by representation what their fa- 1. Bent. 316
ther would have taken. There is no distinction 323
made by these Statutes between the whole blood & the half blood. The enquiry is not Which of the relations has the most of the intestates blood in him? but Propinquity is the only thing to be looked for.

1. Dr. Mr. 25.	3 Dr. 19.	Sharp 710.	
574.	1 Alk. 458.	Salk 38.	
2. Dr. 51.	1. Vesy 156.	351.	
50.	393.	2 Vesey 213.	
348.		1 Bent 323 316	
341.			

Lec. 13
Feb.

Estate of Dec'd Persons

Of the Advancement of children by the Father

It is a rule in law that where a child is advanced ~~by~~ by his father, he shall not be entitled to a distributary share under the Stat. unless he throws the property advanced him into Hotchpot, that is unless he puts the property he has received into the Common stock that all may take equally he has his choice either to bring it into Hotchpot or retain it & run the risk of the others having more than himself. As to what may be consid^d an advancement it has been determined by a set of adjudications. The child must have been actually furnished with property for his future support. Occasional presents to a child are no advancement.

Where the Father has advanced any consid^{ble} sum for the education of a child if it was
30 Mm
317. as much as he is able to give his other children it may be questioned whether the child could come in for his distributary share, tho the current of authorities are against education being consid^d as an advancement. Money paid out to a Master for ~~a child~~ learning a child a trade is consid^d no advancement for it said to be only paying the Master to keep

him instead of the Parent. But where the Father buys an office for his son, tho' but at will, as a Commission in the army & the like, or where the Father makes a provision for his child by a marriage settlement, there are advancements. Where the child advanced is dead leaving children the same rule obtains. This doctrine is confined entirely to an advancement made by the father for if the child is advanced ever so much by any person except the father, by any collateral relations, by a Stranger, or even by the mother (2 Pr Wms 356) out of her separate property he is now withstanding entitled to his distributary share. For it is said in 2 Pr Wms 356 that the Statute does not contemplate an advancement by a Mother, it only speaking of those who could have a wife & children & that the Mother could not have both was a clear case. There is no case in Eng. or Con. where an advancement by a Mother ~~for bee~~ made during the life of the Father has deprived the child of his distributary share & yet it has never been questioned that a Mother surviving the father & dying intestate is within the stat. as well as the Father.

Estate of Deceased Persons

Of a Will without an executor & what is the case is where there is no will—

If a will is made without any executor appointed, administration is granted cum testamento annexo & the administrator is vested with the power of an Executor. But where there is no will the Administrator is appointed by the ordinary & is to distribute as the law directs. the ordinary may not appoint whom he pleases, his duty is pointed out by the Stat. of Edw. 3 & H. 8. He may appoint the widow, or next of kin or both. if there are 20 collaterals who are nearest of kin & of equal degree he may appoint all of them, or select any one he pleases. or he may grant administration to one over one part of the Estate, & to another the administration of another part. It is to be remembered however that there are joint admors & the act of one does not bind the other. They must sue & be sued together. In case over one bond, or one article there must be only one Admr. If persons in the ascending & descending line of equal degree claim admon the ordinary cannot select whom he pleases,

Rolls 908. Salk. 36.

but must prefer those in the descending line Black. 504.
as if the Father & Son claim, the Son is to be preferred. It has been a Question whether the ½ blood could be admitted to the Adm^n as soon as the whole, but determined they may they standing in equal degree in the Table of Consanguinity. When a Sister of the half blood & a brother of the whole blood claim the ordinary may elect whom he pleases (3. Com. 505.) Unless the female be married, for in this situation she is excluded in all cases, the next of kin in such case would not be appointed, for the admin^x would fall immediately on marriage into the hands of her husb^d. If an infant is next of kin & no other is older he must be appointed, with another person to administer durante minoritate which lasts till the minor is 21. Dob. 251. Tho' an inf^t may be an executor at 17. — This admin^r during minority may be any discreet person. — If the next of kin all refuse to Administer the ordinary must appoint a Creditor, if there be any one who is a discreet person, & if Creditors refuse he may appoint any person — If the Adm^r die before he completes his adm^n, his adm^r nor exec^r can finish the adm^n but an adm^r de bonis non is to be appointed & proceed to complete what the former

If there are 2 adm^rs both must execute releases, but otherwise Lat to Ex^rs

Estate of Dead Persons

adm^r had begun. The case is different when an his office descends to his ex^r if he appointed one, otherwise not executor dies. When 2 Adm^rs are appointed & one dies his adm^n survives to the living Adm^r. The first thing the Adm^r is to do, is to go before the ordinary & there give a sufficient bond that Lect. he will administer faithfully. Our Stat. is a copy of the Eng. by which the Adm^r is directed "To make out a true inventory of all the goods "& chattels of the intestate by such a day, to ad "minister such goods according to Law and to "make a due return of his Adm^n at such a day "and to pay over the residue of the estate, as the Court directs.

It is the general received idea upon the construction of this Stat. that the bondsman is bound for the Adm^r that he make due adm^n of the goods, that if he will not pay the debts as the Law directs the bondsman may be sued. But this is not the true idea & cannot be supported by authorities; neither was it the intention of the Legislature but the only person liable in such case is the Adm^r & for misconduct he is liable to be displaced by the Court. The nature of an Adm^n bond is not that the Adm^r pay the debts, or to secure the Bankruptcy of the Adm^r. But the words "to administer ~~to administer~~ truly according to Law" mean that the adm^r return a true & perfect account of his administration.

Estate of Decd Persons

A Creditor cannot sue the bond & assign as a forfeiture that the Admr has never paid him his debt — or assign a devastavit as a breach for this might be done in an action against the admr But as the inventory exhibited is evidence of what estate he had, it determines the question on plene administravit & if the inventory prove false the bond is forfeited as if a man dies worth 400£ the admr makes an inventory of 300£ only & carries it into Court a creditor sues upon the bond — he is concluded by the inventory. But if the admr proceeds to pay out the 300£ & the debts are not satisfied, the remaining creditor may sue the bond & assign as a breach that all the estate was not inventoried. Suppose again the admr has carried in a true account of the estate & will not pay the Creditor, the creditor cannot maintain an action upon the bond but must sue the admr. If the admr has committed a devastavit by acting indirectly the Creditor sues on the Bond & assigns this as a breach, he cannot recover because the Admr is still liable & cannot protect himself by a plea of plene administravit. The creditor is to run the risk of a devastavit & not the bondsman.

The expression in the condition "That the residue after debts are paid shall be distributed among

If the adm. whom I is changed dies as to the bond this is no breach for the penalty. / action however must be made to [illegible] this time for [illegible]

Estate of dec^{d} persons

the next of kin as the Court shall direct^{s} means no more than that the Adm^{r} after a reasonable time shall make a proper distribution to the next of kin if he does not the bond is liable — For the next of kin can get at the estate in the hands of adm^{r} only by distribution; but it is otherwise with the creditor for he can pursue the assets wherever he finds them.

The Adm^{r} is to make out the inventory by a certain time & if he does not the bond is forfeited. It is to be remarked however that the bond is only liable for what is called the smart money that is for the disappointment of the creditor in consequence of the adm^{r} failing to make the inventory as the Court directed. The bond is only affected as to this transaction as to all others it is good. The bond may be sued by as many as are injured by the breach of it at different times — For it remains in the Office in the hands of the ordinary in Eng^{d} & probate in Com^{n} If the debts are all paid & any property has been left out of the inventory so that the next of kin are injured, the bond is forfeited. So if he has made out the distribution & will not exhibit it to the Court, the bond may be sued. And if the Adm^{r} the moment he is sued carry in the inventories, still the bond is forfeited as to this transaction & smart money may be recovered

Power of ordinary to grant adm^{n} of e. p. beg. in Commth except in case of wife's effects when there is only Castle Chamberlain & there if any other property each is to be dealt with by ordinary of diocese in which it exists.

Ex. may do any act before probate of the will except bringing a suit.

Estate of Dec'd Persons

In Com. when there is not property sufficient to pay all the creditors, the object of the Law is to average it equally among them. & if the Estate average no more than 10/ on the £ & then is estate any of it left out of the inventory, the creditor cannot sue the bond & recover the whole debt as he may in Eng. He may compel the Adm^r to exhibit all the property & this will be averaged again among all creditors

Revocation of Adm^r power

The authority given by the ordinary may to the Adm^r may be revoked tho' the Ordinary is not at liberty to revoke unless for some reasonable cause. as if a will is discovered with an Executor, or if the Adm^r become incapable of performing his duty by reason of lunacy, or run away in such cases the ordinary may make a new appointment. — But when a new adm^r is appointed what shall become of the adm^n of the former adm^r. when the former adm^r had become incapable or run away his acts are bind^g upon his Successor. but when a wrong person has been appointed, his acts are void; or when a will is found. The law is now different. the acts of a wrong adm^r are as binding as those of a right lawful one on the ground that he is to render an account of his adm^n

and if he has money in his hands raised by the sale of lands the sale is good & he is accountable for the money. Suppose he has Cattle &c in his hands they may be recovered in an action of Trover. If an adm^r has been appointed where there is a will & has obtained judgment against ~~executors~~ any person & the debt not collected, the executor under the will may bring a Scire facias upon that judgment in the same manner as if it had been obtained by himself.

Sect. 5. Of the Right of the Adm^r over the Property of the intestate.

Gen. Rule. As soon as the Adm^r is appointed he is vested with the property of the intestate, he may exercise the same right of ownership over it that the Dec^d could be liable to fulfil the same duties. Yet there are certain actions which he cannot maintain which the intestate might & certain actions to which he is not liable, ~~but~~ to which the intestate would have been liable.

So far as it is necessary to collect & pay debts

1st What actions the Adm^r cannot have

* Formerly no action of Trespass for injuries to personal property could be maintained by the Adm^r for it was said the right of action died with the intestate. A Stat. of Edw. 3^d however was made which gave the Adm^r a remedy

* Note a fact that explains the Principle the Intestate the adm^r may bring an action for a tort committed in his life time

where the property was taken away & Courts have determined all injuries to personal property to be within the Equity of the Statute Office of Exec'rs 98 Eliz. 377. Latch 168.

Injuries done to the person of the intestate are left as at Com. Law falling within the maxim "actio personalis moritur cum persona".

Adm'rs liability to actions

~~He is liable on all the~~ A Rule is laid down in the Books "That the Adm'r is liable is liable on all the contracts of the intestate but not for his torts" This however is false for it will be found that he is not always liable on the intestate's contracts & sometimes for his torts the adm'r is liable. * If the tort is "of such a nature that the assets have been "benefitted by it the adm'r is liable, but if the "assets of the intestate were not benefitted the "Adm'r is not liable". The adm'r is not liable for any injury done by the intest. to another's person. — The adm'r is not liable to an action of Trover where the intestate would have been in fault, the action that must be brot against the adm'r is an action on the case for the money had & received for intestate is supposed to have sold the property converted & received the money. This difference ~~between~~ between the action against the adm'r & that which would have been brot

* This rule is not to be understood as if the adm'r was liable for all the torts which the intestate committed in his life time, but only such as caused a benefit to the assets of the intestate.

Estate of Decd Persons

against the intestate has occasioned much confusion in this subject. Cowper Hamley & Prob. See Hamley case.
To find out when the adm^r will is liable for the Contracts of the intest. & where not observe the following rule — "Where the intestate would have been liable for a breach of a trust which would not have benefitted him had he performed it." In all such cases the adm^r is not liable as where a Sheriff suffers an escape, his adm^r is not liable Roll 921 l. 5 Laws. 218. The Adm^r must sometimes sue in his own name as adm^r, at others he must sue in the name of the intestate or his own. In all cases where debt of debts that arose in the life time of the intestate, the adm^r must sue in his own name; but such as arose after his death he may sue either in his own name or that of the intestates. A creditor who is appointed adm^r is in general in no better situation than other creditors — Creditors of a superior rank will take before him — he has the preference among those of equal rank. An administrator in Eng. has nothing to do with land, by a general rule not appendages to the land — as Rabbets in a warren, or deer enclosed in a park. Leases for years go to him — When however land is extended for the payt of debt it vests in the Adm^r

* To make the adm^r liable the benefit must arise out of the testates estate, but from the person in whose hands it was held

There might be a curious question. What becomes of an estate per auter vie? It cannot go to the heir for there are no words of inheritance in the grant. And the Exec'r cannot take it because it is a free-hold. Before the Stat. of Charles (which gives it to the Exec'r) such estate in Eng. went to the first occupant after the death of the intestate. But as that Stat. has no operation in Con. it is doubtful who would take such estate here.

Of Emblements some go to the heir & some to the adm'r or Exec'r. Natural grass & fruits go to the heir. But all artificial emblem'ts such as are raised annually by cultivation go to the executor. Stones, Hatters settles &c originally went to the heir as being fixed to the free hold by too large a nail to be removed. Now any thing that does not properly belong to the free hold may be taken off & if any injury is done the free hold the executor ought to pay damages. 3. Atk. 23.

Heir-Looms as monuments of the arms or coat of arms. & a chest where Deeds have been kept, go to the heir. Roll. 915.

If the Adm'r mentioned bad debts, for as much as their amount he is not liable. as if he has

Estate of Dec'd Persons

inventoried a Vessel at Sea & it is lost he is not liable to the extent of the inventory.

Lech. 16. Originally at Com. Law if a man commenced an action & died, his administrator could not pursue the action, but must institute a new suit, the old one dying with the Dec'd. The Stat. of Wm & Mary has pointed out a method to carry on the former suit by suffering the admr to go before the Court & ~~assume~~ "mortuus" to the name of the intest. & then the action goes on as tho he had lived. When the Dft. dies also the Plf. may bring a scire facias against the Dfts Admr counting upon the former action & the cost of the old action is attached to the new &c &c

The Stat has made ample provision for ~~the case where the~~ the Plf. but seems not to have sufficiently contemplated the case of the Dft. for when a Plf. has brot an action without a cause & died his Admr may or may not pursue the action as he pleases & if he does not & the Dft has been put to cost he will loose it. This however would be very unreasonable. The Stat. says the Admr "may enter" & pursue the action now if this could be construed must

the Admr would be compelled to pursue the action & the Defr would obtain his costs. such a construction would not however be just. But in all cases in which the admr sues as Admr where he might sue in the name of the intestate, he is liable to costs, if there was no ground for the action. The legal estate of a mortgage descends to the heir but the beneficial interest is ultimately the executor's After the Law day the heir may take the mortgaged premises if he will pay the mortgage-money. This estate is not to be inventoried the money to redeem is to be put in the inventory as fast as it comes in.

Executor's interest in the Apprentice, Of the Decd.

An apprentice is not assignable. he was put out for instruction in his trade & as soon as the Master is prevented by the act of God from affording such instruction it would seem reasonable that the Apprentice should be released.

Where Commissrs have rejected the claim of a creditor there lies no appeal — but if the Commissrs allow a bad debt the executor may always contest it — The Exr may always withdraw a debt from the assets if he pleases

Estate of Dec'd Persons

The Adm'r in Eng. is to pay debts after the following rank —

1. Funeral charges that are not extravagant.
2. King's Debts not fines.
3. Debts in last sickness.
4. Debts upon record.
5. Specialty Debts
6. Simple contract Debts.

Where the Adm't has paid where no debt was due, he is accountable for the amount of such debt, unless he has acted a reasonable part. His safest way when there is a doubt about the legality of it is to file a bill in Chancery to have all the creditors appear and for such debts as Chancery allows him to pay he is never again liable, tho' they should prove not to have been due. The Adm't is not obliged to take every legal advantage to avoid a contract. as the Stat of limitations But there is an authority in Bacon to prove that the adm'r must take advantage of the Stat. of usury.

An Executor in his own wrong, is a person who undertakes to administer the estate of a Dec'd without any appointment either by will or by the ordinary. Creditors may sue him & recover to the extent of the property he has in his hands belonging to the Dec'd & must be described in the writ, as

executor of the last will & testament," (of a person who never made any will) He is sometimes however described as "executor in his own wrong" If he was a creditor he cannot retain money for his own debt & is in no better situation than if he had not assumed the office. There can be no executor in his own wrong where there is a rightful one unless where there has been a fraudulent conveyance, or a Donatio causa mortis. In the former instance viz. where a fraudulent conveyance has been made the vendee is executor in his own wrong for the dec'd oblig'or & is liable to creditors to the extent of such property. In the latter inst. where a voluntary conveyance was made if there was not other property sufficient to discharge the debts the Donee wont be executor in his own wrong for the dec'd.

Of the power of a Testator to limit over his personal property.

By the antient Com. Law no personal property could be limited to take place in expectancy. because such property is of so transitory a nature & so subject to be lost, it would tend to stop that easy circulation of property which is so necessary to commerce, & create quarrels

if it was suffered to be limited over.
Chattels real may be limited over to any persons in esse. A man may also devise his books to one person for life with a remainder to another 2 Blac. Com. 398. But if personal property is given to a man in tail, it vests in him absolutely & no remainder shall be good for the Statute is not allowed to devise an estate so that should tend to a perpetuity. A man may give personal prop^ty to another for life & then to his son, & an estate would vest in the son ~~in the root~~ absolutely without tend^g to a perpetuity. but ~~it would not be so~~ an estate of personal prop^ty to a man & the heirs of his body would vest an estate in the grantee in the nature of a fee simple.

Sect 17. Feb 17th

Of the Stat. of Mortmain

This Stat. was made to prevent persons from making donations to corporations & particularly to prevent the property of the nation from falling into the hands of the clergy. After the Reform^n was established when there was no danger of this kind, donations to corporations for public or charitable uses were decided to be without the Stat. till a Stat. of George 2nd intervened & declared

them to be within the former Stat. In this of George however, donations to The Universities ~~and the College~~ are excepted - money given to be laid out in lands is also declared to be within the Stat. of Person. Prop.

Wills by persons of non sane memories, drunken persons &c are void. It may be that Wills of persons born deaf, dumb or blind are good - If it can be made to appear that they saw, or in case of a blind man that the will was read to him & he consented.

Wills made under duress are void. The rule in law does not ascertain how far threats must go to destroy a will - tho' every case that has come up where there was any kind of duress the will has been avoided.

Where fraud has been practised to turn the testator's intent the will has been ordered void in all the cases Reported except a single one - Fraud in this case was made use of to influence the Testator to destroy a will in which he had conferred his property upon an unworthy object, & in the second will had given the prop. to his wife & child.

This was looked upon to be just & pious fraud that the will was confirmed.

Persons guilty of treason or any high crime by which their property is forfeited are incapable of making wills.

It is a maxim in English Law & a very important one, That the intention of the Testator is to govern, if it can be found & is consistent with the rules of Law. If by this it meant that if the will is inconsistent with any form of technical words it worded according to the strict rules of Law & the technical forms, it is good, otherwise not, the equitable intention of the Stat. is entirely defeated. It cannot however be presumed that this restraint was meant to be put upon the Maxim. Butler's explan^n of it seems to be the true construction — That if the intention was legal it might be executed, even if the technical forms of the Law were not complied with. but if, for example, the Test. also had devised a Library of books so that a perpetuity would be created, here his intention might be plain, but for the ~~the~~ great being contrary to law ful it is void. It being

an unlawful intention it is not binding.

Of the admission of Parol testimony respecting wills.

Formerly greater latitude was allowed in admitting testimony relating to wills than to other instrumts but now there seems to be no distinction - The same rules of admission of parol proof will apply to all cases - 2 Atk. 372 - When the ambiguity arises from any extraneous matter, foreign to the will, parol proof is admitted as where an estate is given to a son John & the man happens to have 2 sons by the name of John parol testimony is admitted to prove which John was meant. or if the Testator has misdescribed the Legatee by mistaking his christian or surname, it may be proved by parol who was the person meant -

Of rebutting an Equity - Where Legal words convey one idea, by an equitable construction parol testy is sometimes let in to contradict that idea by disclosing the intention of the Testatr - As where an executor has a Legacy, the law is that he shall not take the residuum, but parol testy.

is admitted to show that the Testator intended he should be the residuary legatee. The rule is that where the ambiguity arises from the face of the will parol proof is not to be admitted. There is however an exception to this rule in a case reported in 1 Bro. Ch. 172. This has given rise to an equitable rule "that parol proof may be let in to explain facts to give a construction to the ambiguous words in a Will.

Requisites for a will of Pers. Prop.

There must be 3 Witnesses to a Will of real prop. but as to a will of pers. prop. no witness is necessary. If it appears that the will is in the Testator's hand writing & his name any where upon the writing it is a good will, sealed or not — Or even if his name is not in the will, yet if it is proved to be his hand writing & that the Testator signified it to be his intention that the will is valid. And even if the will was not written by the Test. but it can be made to appear by parol evidence that he approved of it, it is good. A will of Personal Property is the lowest of all instruments

Almost any person may be an executor, but when persons of no discretion are appointed they may be displaced. But profligacy of manners does not disqualify a person for the Office. An infant may be appointed executor ~~of any age~~ let him be ever so young. he is not permitted to act till 17 as executr - but previous to that period an ~~Admr~~ durante minoritate is appointed. Tho' an infant may rescind his contracts generally, yet those entered into as executr are binding upon him except &c

A Legacy to a man's wife is said to be the husbds Tho' if it is expressed to her sole & separate use it is her's alone. This idea however breaks in upon the old maxim That no feme covert can own pers. prop. in possession. This is certainly contrary to a rule of law & we have before seen that if the intent of the Testator is against a rule of law such intention is void. The Courts however have by some method or other evaded the law & the practice of suffering such legacies to be good is a ~~detestable~~ just practice. Legacies issuing out of lands given to girls in terrorem (on condition that they will not marry a particular man or a man in a particular profession) in such case

* Such bequests where this is explained

with the intention of the Testator shall be complied, & the legacy defeated by a Breach of the condition. 1 Pr. Wms 81. — A Donatio causa mortis, conditioned to revert to the donor, verts, immediately, on the dec'd death in the Donee & the executor has nothing to do with it. 1 Pr. Wms 406 This is a Question whether a bond Such donation must be delivered to the Donee personally - a donation of Cattle on such a farm is not good in law. It is a question whether bonds are subject to such donation - if this is the case the Executor cannot take such bonds, for if he could it would be discretionary in him whether to give the bond to the Donee or not. Such a Donation is substantiated in 1 Pr. Wms 406

Lecture 18th Feby 19. 1793

Of Nuncupative Wills

These are wills which depend entirely upon oral evidence At Com. Law such wills were good But the Stat. of Charles has laid so many restrictions upon them that they have fallen into disuse - The question may make a figure in Com. Whether any Nuncupative will would be valid - And if valid how far they might extend as it has been the universal practice in Dower cases in this country

to reduce Wills to writing it is very doubtful whether Courts would admit a Verbal will - But if admitted as valid, it is very uncertain how what would be their extent, as the Stat. of Car. which puts such close restrictions upon them have no operation in this State.

It is an established principle in the Eng. law that a will of real & personal property altho it be defective to pass real yet may be good as to personal estate. This however is a very unreasonable principle, for the intention of the Testator may be completely defeated by it & great injustice done to his family. For inst. A man having 6 sons & 6 daughters devises his real property to his sons & his personal to the daughters. The will happens to be faultly signed perhaps by only 2 witnesses, in this case the will is void as to real but good as to the personal Prop^y & the daughters will take the whole personalty & the eldest son all the real estate, so that the other 5 sons would be completely excluded & the intention of the Test^r greatly thwarted. It is easy to see that cases of this kind may frequently happen. It would appear reasonable

that this unjust principle should ~~make~~ give way to the positive & unerring rule That the intention of the Testator is al ways to govern, unless inconsistent with Law.

We have seen that the Adm^r before appointed by the ordinary, has no authority over the goods of the intestate, but the Executor before probate of the will, may exercise any power over the property of the dec^d that he can after, with a single exception of suing he can bring no action till after probate, tho he may discharge & collect the debts Before he has proceeded to any such it is at his plea sure to refuse or accept of his office, but if he has done any act in the character of exec^r he must accept. Office of Exec^r 3 L. 1 Salk. 301. If the exec^r neglects to appear the ordinary may summon him before his Court & there he may accept or refuse. but if when summoned he does not appear the ordinary will excommunicate him & administration will be granted to one, cum testamento annexo & in such appointment the ordinary need pay no regard to the next of kin.

In Com. instead of excommunication, the Ex-

ecutor is only fined 5 £ for non-appearance on being cited by the Probate Court.

Generally 2 Exec^rs are appointed & if one refuses the other may proceed to execute his office as tho' he was sole exec^r - but the executor who refused may come in at any time during the life of his co-executor & act jointly with him. If both accepted a Pl^ff must bring his suit against both - if the one who refused is sued he may plead that he was never exec^r but if he has come in & done any act with his co executor they may be sued jointly. 1 Roll. 918.

If an executor dies his exec^r may succeed him in his office & adm^r the propert^s of the former Testator - he is not obliged to accept of this however. This is not the case with the Adm^r of an exec^r or the exec^r of an adm^r - They have nothing to do with the adm^n of the former dec^d person's estate.

When there are 2 Exec^rs & one dies, the his exec^r cannot be joint exec^r with the original Exec^r, but the Office falls solely into the hands of the Survivor - Suppose again the survivor dies, the exec^ship will not then go to the Exec^r of the former dec^d exec^r but to the Survivor's exec^r - Suppose the survivor dies intestate, shall the office then

go to the exec^r of the original exec^r? No for the right was solely in the Survivor. Office of Exec^r 101. Important question shall both executors be jointly liable for the Devastavit of one of them? Abstractedly consid^d they are not liable for one, if one had rec^d a certain portion of prop^y to administer & it had not come to the hands of the other the one who had it in his possession would be liable alone for waste. Consid^d it in another point of light. They both rec^d money & gave a joint receipt for it. One took it all & committed a devastavit, both are liable, for the receipt in the names of both is evidence that it came to their hands jointly. This rule embraces all cases of the kind. Salk. 318. 2 B. 6th. 114. The authority in Salkeld makes a distinction between Legatees & Creditors as in the case last put the Creditor could have his remedy against both exec^rs but Legatees could not only against the one who had committed the devastavit. But the later authority in Brown abolishes this distinction.

An Executor is not so liable to be resorted as an Adm^r. The ordinary may take away

the Admx from an Admr for almost any imprudent conduct, a trifling want of discretion, or for being in failing circumstances & But an Executor cannot be displaced for such causes his discretion must be weak indeed to be ground for displacing him & he cannot be removed on any suspicion of his becoming a Bankrupt, tho' in such case Chancery may compel him to give bond. The Exec in Engd in act proves the will before the ordinary by swearing that it is the true will of the Testator & if a will of Person Estate only, it is then good provided no one appears to dispute it If there are Witnesses the practice is to examine them privately & reduce their testimony to writing to show to the ordinary The Exec may cite in the widow or next of kin to certify the validity of the will, if necessary. If the Ordinary refuses to approve of the Will &c he may be compelled by a Writ of Mandamus to appear before the Courts of Westminster Hall & there it is to be tried whether the Exec appointed shall proceed to the execution of his office.

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There are several instances in which admx is to be granted where there is a Will.
1st Where there is no Exec mentioned in the Will - in this case an Admr is appointed cum testamento annexo
2. Where the Exec is a minor - an admr is appointed durante minore ætate
3. Where the Exr is out of the Kingdom, an admr is chosen durante absentia.
4. When there is a controversy concerning Who shall be Exec? An admr is appointed pendente Lite.

Lecture 19th Febr. 20th 94.

When real estate is devised for the payment of debts, before this is touched the personal is to be exhausted, unless the Testator has directed otherwise in the will. This however is somewhat unreasonable, & inconsistent with the principle that the intention of the Testator is to govern, as legacies might would be injured if the Creditors were allowed to take the whole personal fund & this would be manifestly contrary to the intention the Testator when he had devised real property expressly for the purpose of paying debts. 1 Will. 21. 13. 6. 6. 154. The principle ought

to be that, unless the testator signified particularly that the person'l prop'y. should first be exhausted. the prop only real which he devised for the payment of debts might be should be taken by creditors before they come upon the personalty.

If a Testator devises all his debts to be paid debts upon which the Stat. of limitations has run are taken out of the Stat. & may be recovered. The general received opinion that debts revive when taken out of the Stat. is not the true idea tho founded upon false principles they go upon the presumption that the debt has been paid- & that as soon as this presumption is removed the debt revives- But if this presumption is good a devise that all one's debts shall be paid would extend to all other debts ever contracted by the Testator paid or not as well as those barred by the Stat. — The Courts of Chancery have introduced a presumption contrary to this but still all the authorities may be reconciled- Chancery they were taken it to be an existing debt that the Stat was only made to prevent litigation which would arise from suffering debts to lie a long time & the difficulty of ascertaining them. That every man has a right to waive his right to the Stat. & after that he never can resort to it again. A man may take debts out of the Stat.

by publishing that he will pay all his debts It has been supposed that publishing & devising as above is a promise to pay the debt & that this is the ground upon which recovery is to be had. This is not the true idea for where there is an express promise, the creditor may recover upon the original debt & bring the promise as evidence of the debt. The idea is false for another reason - where a man owns that he owes the debt, this is no promise to pay it & yet this may furnish a ground for a recovery upon the original debt.

The most striking argument against the presumption that the debt has been paid when barred by Stat. is this - A man acknowledges the debt to be due but says he will not pay it, in this case most clearly the presumption is completely taken away for the debtor expressly says the debt has not been paid. When a man acknowledges & refuses in this manner, it is no waiver of the Stat. it shows that he means to take advantage of the Stat. & therefore does not furnish a ground for a recovery. From what has been said it is manifest that the law must presume that the debt was not paid & in this way all the authorities on the subject may be reconciled.

Law of New York respecting the estate of Dec^d Persons —

According to the principles of the Eng. law The Real property descends to the heir & the personal to the Ex^r The real in the hands of the heir is liable both to specialty & simple contract Creditors — this feature in the law of New York is distinct from the Eng. principle The first paragraph of their Stat. relative to this subject is to be understood as the principle of the Com. Law taking in the Stat. of Same — it subjects the heir to creditors before the land is aliened it is assets in the heirs hands for the payment of debts & after aliened the creditor may come upon the heir himself. Another difference from the Eng. law — the design of the N. York law is that all debts be paid if there is estate sufficient any where — in the first place the creditor must come upon the person^l property & this being insufficient the exec^r may sell so much of the real as is sufficient to discharge the debt — & the deed is to be given by the ex^r or Adm^r & not the heir — It is to be remarked that these principles do not apply where the estate is insolvent.

In case of insolvency the estate is all to be sold & the money brot before the Chancellor & there averaged among all creditors without any regard to priority of rank The inventory inventory is to include all the real & personal prop^y. in this respect different from the Eng Law.

Administration to be granted to the next of kin as in Eng. The Stat. of N.Y. is a copy from that of Hen 8.th & the distribution is according to the Stat. of Charles & James with a single exception a child advanced by his father is not to throw his estate in hotch-pot what property has been advanced him is consid^d as an advancement without throwing it into the common mass. The Administration bond is as in Eng. Respecting Legacies, the decision is not before the Chancellor as in Eng. But the Court of Probate in N.Y. is vested with all the authority over legacies which in Eng. is vested in the Court of Chancery & Ecclesiastical Courts. The judge of Probate may enforce his decree by issuing an execution against him who disobeys & confine him till he will comply. By a stroke in their

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that they have adopted the english mode of enforcing decrees, excepting the infliction of ecclesiastical penalties.

There is another equitable difference from the English law. They have made a provision for the redress of injuries done by the testator, by ~~the Exr or admr~~ suffering the action to be brot against the Admr or Exr.

Respecting the liability of the Admr to costs the law as in Eng.

Law of Connecticut

The real estate is said to go to the heir & the personal to the Exr. There might however be a question whether this is actually the case? For an injury to the realty the practice is for the heir to bring the action & for any injury to the personalty the action is brot by the executor. The title of the heir is defeasible in case of insolvency, it is totally defeated & if the personal fund is insufficient for the paymt of debts it is partially defeated. The realty is a subordinate fund the personal must first be exhausted. In Eng. real property is a fund for specialty debts only. In Con. for all debts, & in N.Y. when the action is not against the heir it is a concurrent fund with the

personal estate. How as in N.Y. all the prop. Real and pers.l is to be inventoried & if the pers.l is not sufficient sufficient to pay debts, the Exec.r may go upon the property in the hands of the heir (with leave of the Court of probate) & sell that till the debts are discharged but the exec.r must not keep the land himself even if he advance the full value of it. This has been determined by a decision of Court. When the heir has sold lands for money, the money is assets & the heir is trustee to exec.rs. After debts are discharged the heir is entitled to the remainder of the real estate. Suppose the estate is found to be insolvent & any injury is done to the lands in the hands of the heir Who shall bring the action for this injury? True the heir may if he chooses but it is not at all probable that he would for the property is all going to be taken from him & he would only subject himself to costs for nothing. This point is as yet unsettled but Why ought not the exec.r to take the whole command of the property till the period is elapsed in which he is to administer the estate & then if any thing be left give it up to the heir [illegible] the [illegible]

~~the case was it for~~ our Law in this respect is a little tinctured with the Eng principle relative to heirs; otherwise the Exec would be empowered to take the Propty as above.

In Connecticut it is apprehended that no action can be brot against the heir as heir, tho in N.Y. their Stat. has provided that he may. If the exec has distributed to the heir & a new debt comes in it may be recovered out of the heir tho not as heir. In Eng it could be recovered only in Chan cery & not at Law. There an estate descended ~~descended~~ to 3 females & they were all sued as heir when a new debt came in, & this probably would be the case in N.Y.

There has been some doubt whether a mortgage descends to the heir or exec ~~at any rate the heir has the nominal interest~~ The practice is for the heir to bring the writ of ejectment & when must? when he ought to con vey it to the Exc^r.

Lecture 20 Feb^y 21.st 94.

Continuation of the Law of Con.

The exec is liable to be sued in Com. Law Courts as in Eng.

The personal Propty is first to be exhausted before resort is had to the real — When they are both insufficient for the payment of debts the Exr or Admr must be careful how they pay debts — They must represent to the Court of Probate that the estate is insolvent if the Exr has discharged a debt previous to this he is accountable for what is beyond the average, but it is apprehended he may compel the Creditor in such case to refund. — As soon as insolvency is represented, Commissioners are to be appointed — They are vested with the power of a Court — they are to ~~accept~~ examine all claims upon the Estate & may accept or reject at their discretion. After the Report of the Commissioners is returned to the Probate Court the rejection of any claim is final & conclusive as against creditors — If Creditors wish to reverse their transactions they must go to the Probate to prevent the acceptance of their Report. The judge if he thinks proper may reappoint other

Commissioners on the same again & give them his opinion upon the matter (& if ~~the Creditors claim is still rejected he may appeal to the Sup. Court~~) Commissioners are more likely to accept than reject claims for after they are accepted & return made to Probate, the exec^r is not obliged to pay them, but may litigate with the Creditors ~~in the Court of Appeals~~. If the ~~Executors~~ Executry or Admr admit ~~more~~ claims to ~~have the estate is worth to the~~ a greater amount ~~of more~~ than the value of the estate it is represented insolvent. If the estate is solvent, the judge of Probate has nothing further to do the Exec^r proceeds to ~~administer~~ distribute the estate according to the law. But if it is represented insolvent the judge averages it among the creditors. Government debts, & debts in last sickness & funeral charges are to be discharged in the first place then no preference among Creditors. There is some doubt respecting ~~what~~ the meaning of the ~~Statute~~ phrase sickness &c. whether it extends to all sickness of the Dec^d or only to the last. Thomas Lechmere Trust as the Intestate was

taken from the Stat. of George which says last sickness ought to receive the same construction. The contrary idea however seem the most plausible that as they had the Stat. of George before them the Legislature would have copied it verbatim if they meant to adopt the same principle. The universal practice at present is conformable to the Eng. mos custom of including the debts for the last sickness only. & this is the most reasonable practice whether agreeable to the Stat. or not. There has been no decision of Court.

Another difference between our Law & the English is that the Adm'r or Ex' cannot plead plene administravit here. For if the estate was insolvent it was averaged by the judge of Probate & if solvent the Adm'r or Ex' must discharge a fair debt. in the former case they must plead that the estate has been averaged. If there has been just property sufficient to discharge the debts & Legacies demand the Adm'r may plead plene administravit All the other principles respecting Legacies are the same as those mentioned under the

English Law on this subject.

In Eng. if an admr plead plene administravit the Plf would reply over a devastavit. But in Con. there is no room for such a practice - for if the estate was represented insolvent the Admr has been compelled by the judge of Probate to distribute according to the average made & if the estate was solvent creditors must sue upon the probate bond. The Admr is answerable to the Court of Probate for any waste & then an average is to be struck -

The leading feature in our laws upon this subject is that all creditors shall have their equitable parts of the Dec'd persons estate in proportion to the magnitude of their respective debts. It is necessary to mark with accuracy this distinction between Con & the English Law for the principle of averaging & a few regulations necessarily arising out of that principle are the only deviations from the Law of Eng. After an average has been struck, a legatee cannot reply a devastavit for the very cir

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circumstance of there having been an average ~~(shows)~~ that the Creditors have not been fully paid & they hold preference to Legatees — & if there had been property sufficient to pay both the legatee might sue probate bond.

Another difference from Eng. Law — By our Stat. if the Creditor does not bring in his claim to the Commissioners he is barred — unless when an average has taken place new estate is afterwards discovered. But supposing a creditor in this situation ~~stands~~ had a debt of 100£ & the new discovered estate was the same sum of 100£ Could this creditor take the whole? No a second average would take place & this creditor would take only his share — for if he might take the whole, men would be encouraged to keep back their debts from the Commiss^rs — if they happened to know of some estate of the Testator's that had not been discovered, & great fraud might take place. in this way it would also destroy the uniformity & equality

Doubtful law

The Act does not say that those who have carried in their claims shall not take advantage of the newly discovered estate it only says those who have not carried in may take advantage of it. There is a decision Reported in Kirby which was evidently unwarrantable in which the Creditor who neglected to carry in was suffered to take the whole amount of his debt & no second average was made — Suppose the new discovered estate was worth 1000£ & this last creditor took his whole debt of 50£ What shall become of the remainder? Shall it go to the next of him, when perhaps the other Creditors have received only 2/ on the pound? The Superior Court, however, in the present case of the kind reversed their former decision & ordered an average — To compel an average resort may be had to the Probate bond. Tho' the best method is to inventory such newfound estate & if this is done there is no necessity for suing upon the bond but if the exec'r refuses to inventory then sue the bond. By these principles the average Law is kept entire. Mr Reeve tried my case upon this ground & succeeded in the Superior Court.

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It is apprehended by Mr Reeve that in this Country there exists no such character as an executr in his own wrong. This is a new doctrine & contrary to the general opinion & that of the Court also. It is apprehended that the existence of such an Executr would defeat the construction completely the intention of the average law - for he would be obliged to pay the whole debt to the first creditor who might demand, whether the estate was insolvent or not - such a character might here be sued as a Trespasser - It is true that if an estate was solvent he would do no harm, but if the estate was insolvent the most palpable injustice might be done As sharpers would take advantage of the law & hire somebody to assume the Character of an Executr de son tort & come upon him immediately & recover the whole amount of their debts, when an average ought to take place among all creditors. It is hardly to be supposed that such villainy would be countenanced by our Courts. As long as the Admr is answerable to the whole extent of the property of the dec'd there can be no necessity for an executr de son tort If there is any re-

cessity for such an Event it can only be in the case of a fraudulent conveyance & a donatio in contemplation of death" donatio causa mortis. Even if admitted in such instances our favourite & important principle of averaging would again be disturbed - as the Creditor who comes first might obtain the whole amount of his debt. -

Another difference from Eng. Law -

There has been some confusion concerning the Heir's being bound by the covenant of his ancestor - Some have supposed that he is bound as heir - This idea however is erroneous. for ins. A man binds himself, his heirs, assigns &c to suffer another man his heirs &c to travel across or keep a ditch thro' his lot - in this case any person who takes the estate under this incumbrance is bound just as the heir is & on the same principles - so that the heir is not bound as heir but as assignee. The heir is bound by the covenant when he enjoys the estate from the ancestor

In this State Chancery & ecclesiastical Courts have nothing to do with Legacies as they have in Eng. - nor have Courts of probate any authority over them. Ex stat. The Stat has made no direct provision but the universal practice is to recover Legacies before the Courts

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Courts of Com. Law. Legatees state their claim before the Court & there it is tried. It is ~~frequently~~ the practice for the judge of Probate to order the Exec^r to pay over Legacies; tho' if the judge does not please to do this the Legal remedy is before the County Court.

Lecture 21^st Feby 22^nd 94

Continuation of Connect. Law

The admr always pays costs in unfounded actions where he does not recover.

Our Distribution of Personal Prop^y. is according to the Stat. of Charles, with one or two exceptions Viz. Brothers & Sisters of the whole blood are preferred to all relations except children — The whole blood are preferred to the ½ blood in the same degree. Next The Brothers & Sisters of the whole blood being dead, the brothers & Sisters of the ½ blood take in preference to any others in the same degree, as Grandfathers for inst^ce parents then take, and after parents

The method of proving the Will among us is different from the English method both solemn & common. Their common form is to prove it by the oath of the Exec^r but this is totally rejected among us,

their solemn form we have not altogether adopted. As they sometimes cite in the widow or next of kin which is never done here. Our practice is to swear the witnesses the will is then proved. tho' if any person wishes to dispute the validity of the will he may enter a caveat & the Court of Probate will not proceed any further in the business till all parties appear. This is a practice adopted without ~~without~~ any direction by Statute.

There has been no instance here of a Nuncupative will — & if any would be admitted, it would not according to the Eng. Com. Law, for that allowed them to be of any amount neither after their Stat. regulating nuncupative wills, for this was made in the reign of Car. at a time when Eng. State have no operation among us. as the property of a Dec^d is so equally distributed in this State we have no necessity for nuncupative Wills. ~~How frequently soever~~ Our Statute requires all wills to be in writing. ~~Some precedents for committees may may be adopted but not~~ No will is good in law if writing —

We have seen under the Law of England that when the Exr is summoned by the ordinary on his refusal he is excommunicated. Our law is different. he is here fined 5£ a month till he appears & then may accept or refuse.

Can a Minor act as Ex^r in Connec? This is like to be made a question yet it appears plain enough by the Stat. that he may as our Stat. recognizes the English principle This Stat. however is said to be repealed by another which directs an ex^r to give bonds and as no infts bond is binding it is said he cannot be an exec^r but this does not appear to be the fair construction of the Statutes It would seem more reasonable that as the Stat. has declared an infant may be an exec^r & then that an ex^r shall give bonds, the clear inference is that an infant Exec^r shall not be bound by his bond—

With us an ex^r is never a residuary Legatee unless he is made so expressly by the Testator & there is a plain reason for this difference from the Eng. Law In Eng. an ex^r has nothing allowed him for his trouble & time but here he is paid for his pains & has no beneficial interest in the estate but is to all intents a Trustee. Where he is a naked trustee there is no difficulty in his being admitted as a witness in an action notwithstanding he be a Pl^ff or Def^t. But where he is interested as where he has a Legacy he may not be admitted. It is said by some that as he has to pay costs if he does not maintain his action, he is interested & comp[etent]

ought not to be admitted to testify. This objection however is easily removed when it is considered that the costs are not to come out of the executors private purse, but are to be paid out of the Assets.

If the executor owed the Testator ~~his Estate~~ his debt would be extinguished, unless a Legacy was left him. This the Eng. Law

We have a practice not directed by stat. neither found in the English law ~~of~~ for the Probate to make an allowance to the widow of all necessary clothing, Cow, Sheep & all the property that is not subject to execution. This is never the case only where the estate is insolvent. For if ~~by the Statute~~ ~~was whether~~ ~~should be followed or not~~ ~~the Court of Probate~~ ~~has~~ a power [illegible] has been complained of, that the Court of probate should use this discretionary power & it is questionable whether the practice is warrantable. In one instance where an indiscreet allowance was made the Superior Ct. abated it but as the relations in that case were willing the widow should have a reasonable allowance the Court remarked that they would not touch the question whether the Probate had a right to exercise this authority.

Our Statute respecting judgment debts have

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having no preference among Creditors" has caused some doubt as to the extent of it. The prevailing opinion concerning it Mr Reeve conceives to be ill-founded. A Creditor has attached the property of the debtor before the sale the Debtor dies insolvent now it is said this Creditor has lost his hold & can, by the Stat. have no preference to other creditors. This would be unreasonable indeed & is a case that the Statute never contemplated in the remotest manner, nor can any such idea be gathered from the expression of the Stat. the question is not between a judgment Creditor and a debtor, but an Attaching Creditor & a Debtor. Besides this case may be compared with the situation of an execution as where a man has not only obtained judgm^t but levied his execution, he is not liable to be defeated in his hold by an insolvency. — The Statute only means that a Cred^r merely because he has obtained judgm^t having as yet no hold of the property of the Debtor, shall have no preference to other Creditors for this would defeat the average law. In Eng. if judgm^t is obtained the officer may proceed to collect the exec^n.

c. 82. — an attaching creditor cannot hold property by 2^d & 3^d Edw. 6 cap. 12 sect. 2 against

for example

for it is the English principle that whoever by legal diligence can obtain judgm^t first shall have the preference paying no attention to the principle of allowing every cred^r an equal chance! Because the form of the execution runs "to take his goods &c & for want thereof take the body" yet if he be dead & his body not to be found, this can be no reason why his goods should not be taken. And if money was to be paid over to the person dying his ex^r is his representative completely & may receive it without any difficulty.

In England there is no such thing as Distribution of real property the entry of the heir is all that is necessary. Our law is very materially different. Our Court of probate is authorized to distribute the property among claimants & before distribution takes place they are tenants in common & after tenants in severalty. But the claim^s cannot possess in severalty without the power of Probate & where distribution is made by the judge between all the legal claimants, this distribution is conclusive but where there are 2 sets of

claimants & the judge prefers one - as if a Grand Father & Nephew should claim & the judge prefer the Nephew, this would not be conclusive, being directly against the law of Distributions - in this inst. the G. Father might appeal to the Sup. Court & obtain redress. This appeal from the decision of Probate must be ~~within 12 months~~ to the next Sup^r Court in the County - unless in certain cases of minority &c

The Adm^r cannot be arrested in any suit in the course of the proceedings tho' if any person could for a scire facias, there is no reason why he should not in such case. The reason why he may not be arrested is that the action is not against him but the assets in his hands. our law & the Eng. agree in this respect.

Our Law respect^g Advancem^t same as N. Y.

By our Statute if claims are not brot in within a limited time they are barred. In case of insolvency it is evident no recovery can be had - for an average has been struck & all the prop^y exhausted - but when the estate is not insolvent there seems to be no substantial reason why a Cred^r should not recover his debt when there is prop^y sufficient for it probable the stat runs in

tended that the Creditor should be barred only as to a recovery from the Exp^rs. In Statute language the intention of the Legislature might be thus expressed. "Creditors, you shall not be eternally harassing the Exec^rs but shall bring in your claims within a certain time & if you neglect you shall forever barred" as to a recovery from the Exec^rs It is to be remarked that the Statute is only speaking of executors. There is not the least hint that the Creditor shall be completely barred from recovering his debt & Courts might determine with the utmost safety & consistently with the Stat. that Creditors should recover, in case the property of the Dec^d should be sufficient, notwithstanding he can never recover of the Exec^rs. A creditor in such situation ought to be allowed to take the property wherever he finds it. otherwise the greatest injustice takes place. for he might very probably be absent at Sea, or in some foreign nation during the 6 Month's in which the Exec^rs is to settle the Estate & nothing can be more unreasonable as well as unjust that he should loose his debt in such case. The General construction therefore put upon the Stat. is unwarrantable & indefensible on every grounds

Of Title by Occupancy to things personal

Lect 22
Feb 22d 1st — Fera Naturæ.

The Property men have in Beasts &c with is a qualified property - it is only commensurate with the possession. As soon as the possession is lost, the property in them is lost. The possession continues as long as the animus revertendi can be discovered in the Animal. As to many animals as soon as this desire of returning ceases, the possession is lost & is open to the first occupant - as in case of Doves &c. To kill these animals it is a Trespass & to take off those which are useful to eat as Deer, Doves &c it is a tort criminaliter - it is felony as much as to steal any other property. But to take off a Dog, a Cat &c or any animal kept for amusement, is only a civil injury.

It is no trespass to pursue this property on another man's land tho' the owner is liable for damages. It is the English law that the owner of the soil shall have the honey found on his land, let who will find it. In Con. whoever finds Bees, owns them & may cut down a tree without being a Trespasser, tho' liable to any damage he may do - just kind of damages however fall under the maxim de minimis lex non curat

Altho' the property in these feræ naturæ is generally open to the first occupant as soon as the possession is lost let them be found where they will, yet when they are so far confined in a man's possession as not to be able to get out, no one has a right to take them As young birds before they are able to fly &c.

2nd A person may have a qualified property in Water, air & light. Large Rivers or any streams navigated by Canoes or any kind of vessel are consid. as the public highways & in such water any person has a right to fish &c. but the small streams on one's land no body has a right to use without the owner's leave & no one has a right to divert such water from its natural course. The property in this water may be conveyed as other property without conveying the land with it. The whole benefit of the stream may be so conveyed so that no assignee of the land can set a mill upon it, notwithstanding he is owner of the banks. This estate is merely ideal & is called an incorporeal hereditament.

A may also convey a right of way over his land & this cannot be obstructed by him.

A person may not be deprived of the enjoyment of a free course of air & light which

he has been accustomed to enjoy about his dwelling house. Such an injury is remedied by an action on the case.

There are other instances of acquiring property by occupancy: as where a man has abandoned his property & it appears evident that he has resigned all his claim to it, then it is open to the first occupant. In Eng. & Connec. there are different methods of taking things from the fortunate finder. In Eng. no owner appearing they go to the King. In Con. the finder is to leave the article in the Town Clerk's hands for a certain time & publish it & if no owner appears the finder is paid for his trouble & the rest goes to the treasurer. There has been an instance of a man's finding money & publishing it & because he did not leave it with the Town Clerk & put it in the treasury, he was prosecuted. Mr Reeve defended him & urged that the article money was not within the Stat. he compared it to the case of a will where all the goods chattels &c at a certain farm were devised & money there was not included. The Stat. also ordered these goods to be sold at Vendue & put into the treasury but to sell

money would be a little extraordinary & one reason why it was not within the Spirit of the Stat.

Emblements are said by some to be acquired by occupancy - with how much reason they are referred to this head, it must be conjectured. Lawyers have much puzzled their brains to find out what head they ought to be referred to & finding no other place have stuck them under "occupancy". They have been alternately ranked with Real & Person[l] property playing like School boys jack of both sides. When a man was forfeited person[l] Chattels by forfeiture, outlawry forfeited to K. Emblem[s] are consid[d] real property; that they need not be forfeited. And when they were going to be taken by execution they are by some magic converted in to pers[l] property that the creditor may have his debt. (I don't know however but this was done by Stat.) They are not devisable, they may be conveyed with the land on which they grow, unless excepted to the contrary in the terms of the agreem[t] - Sometimes it is lawful to steal emb[ts] & sometimes trespass. When they are joined to the freehold - as apples on a tree they cannot be taken to take them - when in a heap [illegible] trespass. If a man strips a Cornfield & carries off the corn as fast as he binds it he is only a tres-

trespass but if he stops to pile it up he is a thief all at once.

He who takes advantage of a stream on his own land by building Mills &c may not be interrupted by a person above him so as to injure his works but if A. has accustomed to let out a stream to water his land & a man builds a mill below although he may be injured by A's letting out the water yet he can obtain no redress for A. had the first right.

Lecture 23rd July 25th 91.

The Doctrine of Accession has been already referred to the head of occupancy. Where a person improves another's property the Eng. law is that the original owner may take it with the improvement without allowing for the improvement. If the article is changed completely as Wheat ground into flower or Apples made into Cyder, in such cases the taker is not obliged to restore, but is liable for the injury in damages. Making timber into Sables &c is only improvm.t & the Sable must be restored.

When there is a Confusion or mixture of property he who mixes wilfully loses what he put in, but if the mixture was

accidental it is otherwise.

Goods introduced among us by an enemy unless by a passport we may take & the taker becomes proprietor of such prop.ty.

There has been great controversy in England concerning the right of Authors to their publications & as the English law was far from being unanimously settled by the judges & House of Lords & as there is so great a variety of opinions among the most eminent Lawyers, this subject will probably make a figure in Courts the United States. The Question is thoroughly discussed in the 4th vol. of Burrow in the case of Millar.

Respecting title by prerogative, forfeiture & succession see the 2nd vol. of Black. Com. It may be remarked that there is a very unreasonable distinction in the Eng. Law respecting Sole & Aggregate Corporations, the privileges of the former do not vest in the successor but with those of the latter do.

When a man has entered into a voluntary association he holds his right at his own will & may assign it for an injury the action may not be brot by an individual member, but must be in the name of all.

On Evidence

Lec. 24th Feb 26th There is great difficulty in determining what testimony ought to be admitted & what rejected. The rules laid down in the Books are general & will not apply closely to the circumstances of a particular case.

The Rule is That Courts are not to admit any testimony, but the best the nature & circumstances of the case before them will admit of. This rule is far from being understood to mean "The best evidence that can be in the nature of things" for this would exclude the admission of all parol testimony. And it may be that the party might have adduced better testimony than he did & yet that adduced, admitted. As a copy is admitted frequently with a certificate of the proper officer, yet the original would be higher evidence. If however the party had in his possession higher evidence than that offered, the inferior testimony will not be admitted till the superior is first adduced. As if a man has written testimony in his pocket parol will not be let in till the written is adduced; & after that the parol is admitted in confirmation of the written. If a fact is to be proved as for inst. a date when a memorandum was made of the date & the party or witness has this memorandum, parol evidence of it is inadmissible

The first Division of Testimony is into
Written & Unwritten

Of Written Testimony

This consists of the Acts of the Legislature & the Records of Courts. Here the private acts of the parties are required to be recorded, for distinction they are called "things recorded". Copies of acts properly records, are never admitted unless well authenticated & no other evidence but such copies is admitted to authenticate them. Tho' there seems to be no reason why a Deed might not be authenticated by witnesses who were present at its execution. A Copy of a record is admissible if authenticated by such particular evidence of its truth as the Law requires. (of this evidence in its proper place) Some have contended that the Record itself is not to be admitted so soon as a copy this they have endeavored to make appear from the words of the Stat. The Record itself has however been always admitted & it certainly ought for it cannot but be esteemed as higher evidence than a Copy.

As a General Rule a Copy of a Copy is not admissible - for it is presumed that there must be better evidence.

Statutes are divided into Public & Private - A Public Stat. is such an one as re-

relates to the Community at large or a whole class of men in a Community. A Stat. respecting Usury, or a Stat. relating to the whole Body of Manufacturers is a Public Stat. But one that respects a particular manufacture, as making of Hats &c is a Private Stat.

The Printed Statute Book is evidence of public acts. Tho in general there is no occasion to introduce it, the act being well understood, at least by the judges.

The evidence of Private acts is not sufficient till a certificate is produced from the proper officer, or it may be by the oath of an examiner. The Stat. Book of the several States is admitted as evidence of an old Rule. Where a Stat is general viz a Public Stat. it may be plead under the General Issue unless it is to avoid a Security for a contract & then it must be plead Specially & the Stat produced in evidence as in case of Usury. An after Public act made in addition to or to repeal another act must be plead Specially. There can be no reason for this as a proviso may be given in evidence under the general issue. A Private act in Eng must be plead Specially. The rule in Con. is different here a Private Stat. may be given in evidence under the General issue. One distinction

that obtains amongst us is important to be remembered. A public Stat. need not be produced in evidence, while a Private one must.

In Eng. Judgements of Courts must come with this evidence either a Seal'd Copy from the Court or with the oath of an examiner. in the latter case averment may be made against it, Tho' not in the former. Where no seal is used by a Court, a certificate from the Clerk is sufficient, or the oath of an Examiner. In Con. the oath of an examiner will not do, but the copy must be certified by the Clerk of the Court to be true, sealed or not. A seal has been dispensed with even where the Court is ordered by the Stat. to use a Seal. All Records in Con. have Seales, except Single Justices.

In Eng. true Copies & Private Statutes are carried out by the jury, but not such papers the authenticity of which depended upon Parol testimony. But in Con. all such papers are permitted to be carried out by the jury. The reason given in Eng. for not taking such papers is that the jury cannot take the oral testimony upon which the writings depended, but this can be no reason for they must carry the oral proof with them, in their memories, otherwise it can do no good. A judgement of Court is in certain instances of no consequence as evidence (Rule) where the judgement depended upon

Evidence

a Verdict for the Court might have been averse to the verdict. In such case the verdict must be introduced. But this practice appears to be indefensible upon principle. There may have been different evidence before the former jury & besides why ought the opinion of 12 men who set in the jury-seat to have more weight than the opinion of 12 other Spectators - yet the opinion of the former 12 is permitted to govern a succeeding jury, while the opinion of the latter 12 is suffered to have no influence. It would seem most rational for the jury to take the case up independent of any former verdict. When a former Verdict is to the same point & between the same parties, it may be given in evidence. When the question comes up concerning land it is not necessary that the former verdict related to the same land but if it be to the same point as that on trial it is admissible.

Lecture 25th Feb. 27th 94.

Suppose a man assaulted & the Public Peace is broken the Public prosecute the Offender & by the testimony of the person assaulted a verdict is obtained against him, it has been questioned Whether this verdict could afterwards be given in evidence against the Offender in an action

Ct? & the injured person for private damages? It would be very extraordinary if the Verdict should be admitted in such case & repugnant to every principle relating to the admission of testimony - for the cause Plf. would be evidently taking advantage of his own testimony to recover damages.

An Execution is evidence without the judgement or not, according to the person who offers it. If it is the Plf. who offers it to defend himself or establish a title he must show his judgement for if he had none he is a trespasser or if it was a void judgmt he is likewise a trespasser. But if it is the Officer who defends when charged as a trespasser it is sufficient to shew an execution issuing from a Court of competent jurisdiction - yet the Execution will not be admitted to defend the Officer unless it appeared on the face of it to issue from a Court of competent jurisdiction to him to issue it; or Comparing it with the general Laws of the Land, which every man must know at his peril, it appears that there could be no authority given - By some it is contended & many authorities support the opinion, that if the subject matter of the suit was not within the jurisdiction of the Court all

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all the proceedings being before a Court not having jurisdiction are coram non judice the judgement is void the execution is void & every thing done by the Officer a trespass. Whilst others support the true rule is where the Court might have granted an Exn for any thing that appears to the Officer it would be a good defence. This latter opinion however is not supportable for it is the Duty of the Officer to know the extent of the jurisdiction of that Court or the respective Courts under which he serves & as soon as he looks on the face of it and the exn & observes it be coram non judice he must not proceed to Exn it & if he does it ignorant respecting the jurisdiction of the Court & proceeds it is at his peril. For a discussion of this subject see Bak 10th the case of Marshalsea Hard. 180 2 Million case of Green & Rooke L.Raym. Prescotts Man.— The Doctrine held up in the case of the Marshalsea has been consid. insupportable by succeeding judges & also by M Recue. 2nd Strange 993. Where this Doctrine is established viz. That where innocent persons join in a justification with those who are not innocent, they shall all indiscriminately be liable for the innocent should not have been caught in bad company. Strange 509 (and this was the only ground upon which the officer was relieved!!)

If any part of the Proofs is wished to be made use of as that a writ issued & was not returned, testimony is admissible to prove that a writ actually did issue—

A declaration in a former action cannot be ~~admitted~~ introduced in a Court of Law as testimony against a second claim—yet in Chancery a Bill filed in a former case is admitted to contradict a second claim the reason for this difference is that in a Bill the Dem^t. swears to the truth of its contents—For the ground that proof to show what has formerly been sworn to, is admissible. An infants answer in Chancery is however never to be proved against him in evidence. It will not do to introduce the answer separately—the Bill must be always with it—But formerly before Bills were recorded the answer might be introduced alone in case the Bill was lost—tho' now since Chancery has become a Court of Record the answer is inadmissible without the Bill (Altho English Lawyers pretend to say that Chancery is not a Court of Record yet it is in fact as much as any other.) If the Answer is produced it need not be ~~proved~~ stated to have been under oath for this is always presumed till the contrary is proved. The Law is different with respect to an affidavit this being no part of the

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Records it must be proved to have been Sworn to & produced itself—no Copy is admissible.

The mode of Proceeding in Chancery as to testimony is by Depositions Sometimes there is occasion to introduce there before Courts of Law— Otherwise no Depositions are admitted in a Court of Law & this must be with the consent of the parties— The judges will continue the cause when of the Deposition is of considerable importance tho' the refusing party will agree to admit the Deposition & this under the pretence of waiting till the witness who is supposed to be abroad returns. Sometimes the Parties proceed in a Court of Chancery where they should have gone to Law on purpose to have Depositions admitted. Depositions from Chancery are not in any case to be admitted in Law. It is only in such instances where the witness himself is either Dead, in a foreign country, or prevented by some inevitable accident as sickness &c. from attending.

Testimony in perpetuam rei memoriam is where Application is made in Chancery, to take Depositions of old people or of persons going into a Foreign Country, when an action

is expected to be lost against a man hereafter - In such cases Chancery will suffer the Depositions to be taken. Our Sup. Court are by Statute vested with power to give men (dedimus potestatem) authority to take such depositions

Our Law respecting Depositions is different from the English - Testimony viva voce & Depositions are both admitted in both Courts, & Depositions from a Court sitting as a Court of Chancery are not admitted in a Court of Law. Depositions here are not suffered to be taken at a less distance than 20 miles from the Court. Some have supposed this law a privilege to the witness & that he cannot be obliged to come from a greater distance - This however is a mistaken notion - it is a privilege to the parties only - they may be compelled to come from any distance. In Eng. when a trial of a matter of fact is applied for in Chancery if an answer has been put in & the Chancellor will not try it he may send it to a Court of Law provided the Respondent will consent to have the answer there read.

Lecture 26th Feb. 28th 94.

A judgement of a Court of * competent jurisdiction is conclusive testimony no averment can be made against it, only where it was obtained thro' some fraud in one of the parties - It is not in such case to be considered as being rendered thro' any fault in the Judges. -

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Of the effect of a Foreign judgement.

By foreign judgements are meant those obtained in different countries subject to the same power. These are admitted as evidence, tho subject to a revision. As a judgment obtained in Jamaica W. Indies would be admitted in Eng as testimony but liable to be examined. Or a judgement rendered in one of the United States is admitted in any other State, yet subject to revision. The 1st case in Douglas Rep. will shew the effect of a foreign judgement in Eng. A case may happen in the United States of a judgement being rendered against a man without his knowledge. As if a man in N. York owned property in Massachusets, let this property be of ever so small a value, it may be attached & judgment rendered against the owner for any sum without the Defts knowledge. Tho he is allowed to come within two years & obtain a new hearing, but after this period he is supposed by some to be remediless. If this Law is established the greatest injustice might take place. for judgements at this rate might be obtained against a man for thousands & this the Deft if he ever appeared in the State where the judgement was obtained would be liable to pay the whole or any action on judgements might be brot in another State execution, where no debt was due. Our Courts have however adopted a rule which may

prevent such fraud. After the time limited the Court will presume that the Deft had no notice & will continue the cause no longer but render judgmt. Remove this presumption & make it appear that he had not notice a new hearing may be had. This is a very equitable Rule & will preserve the principles of Law entire. A judgement obtained against a man without giving him actual notice ought to be considered fraudulent & liable to be reversed. And if actual notice is given the Deft whether legal or not, the judgemt ought to be held good. The Off. might easily serve the Deft notice by writing to him informing him of the true State of the business & this is nothing more than his duty.

This is the nature also of an foreign attachments upon absconding Debtors. A sues B. who resides in N. Y. & leaves a Copy of the writ with C. who is supposed to be B's factor. C. appears in Court & says he is not his agent yet notwithstanding this the Court will render judgmt against B. for the whole demand. The way to collect a judgmt against an absconding debtor is to bring a scire facias on the judgmt against the factor. A Copy is to be left with the agent provided he will not expose the goods. But in the case supposed A is careful not to bring his scire facias for he knows C. has no property of the Debtor's.

but may perhaps wait for B to come to this State & then levy his execution & commit him to jail - or he may go to N.Y. & there bring an action of debt on judgem.t & produce the copy of the judgm.t as evidence. In this way great iniquity might be practised. Ought to be permitted to make averment of these facts that justice might be done. Our Courts have invented a method to avoid the stat. by saying that a foreign judgm.t is good for ~~nothing~~ no other purpose than to bring a scire facias upon against the garnishee ~~& by this means they have~~ So that the property of absent man is prevented from being unjustly taken.

The Law respecting records of Marriages Births &c. is different from that of other records The Law is extremely loose as to what shall be evidence of these. If there has been a record & can be come at parol testimony is not admissible but if there was no record, or the record is burnt or lost, other proof is admitted. Before parol is admitted it must appear that diligence has been used to find the record. A Clergyman's certificate, a record in the family Bible, or memorandum in an Almanack are admitted to the exclusion of

parol testimony.

Of Deeds

"Deeds" in Eng. include all conveyances & contracts under seal. It is a rule of Eng. Law that he who claims by deed must make a profert of it in Court for it, another rule of their Law that if ~~he does make~~ a profert is not made the Deed need not be produced if challenged. But in our Law it makes no odds whether profert is made or not for in either case it must be produced if challenged. In Eng. in case of a claim upon a deed the deed is not required if the party is not entitled to the custody of it: as in an action to eject a widow from land in dower, as she is not entitled to the custody of deed she is not required to produce it, her assignment is a sufficient title till for her until a better title is produced. The heir however in such case might be compelled to show the deed. In this country we have no necessity for such a distinction, our deeds being all recorded & a Copy might in the instance of the widow be produced by her.

After the Deed is produced it must be proved to have executed & delivered. This is to be done by Witnesses if alive & if dead or absent it may be made to appear from comparing their hand writings ~~of the grantor with the name on the deed~~. When a deed in Eng. is burnt or lost, its contents

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may be proved by persons who have read it, or a copy may be admitted with testimony to prove it a true Copy. This is the Com. Law in Con. by Stat. an acknowledgment before a Justice is required & if the Justice is alive when the validity of the deed is called in question he is admitted to swear that the deed was executed & delivered. Tho' the more general practice here is ~~only to execute acknowledge its execution &~~ not to deliver the deed till after acknowledgment & the acknowledgmt & execution is consid as sufficient presumption that it was delivered. 2 witnesses are by Stat. required to a deed & if the subscribing witnesses can be had, no parol testimy will be admitted.

Of Comparing handwriting

Gilbert in his Law of Evid. makes this distinction. In civil cases the handwriting compared would be sufficient testimy. But in criminal cases inadmissible. Morgan considers it weak evidence in both cases. & Buller thinks it conclusive in no case. In this Country witnesses are not required to Notes & it may be made to appear that it was not the hand writing of the person whose name is on it, but evidence is not admitted to prove that it was another man's writing. It is the practice

of our Courts to consider the evidence of a man's hand writing as conclusive in civil cases, but not in criminal following the opinion of Gilbert.

Lecture 27th March 1st 94.

In this State we have embraced a wrong idea respecting the design of recording deeds. It is genial supposed that deeds are recorded that when the deed is lost the Copy may be admitted as evidence of the claim - but this was not the design of recording them - the true reason of this practice was, to suffer a man who was about to purchase to examine the records & see whether the vendor had any title to the land offered for sale & thus prevent the vendee from being imposed upon. But our practice gives great room for fraud. A man might forge a deed & get it recorded, after selling it burn up the deed & by producing a copy of record easily establish a fraudulent claim - Our practice was taken introduced by an authority in Salk. 280 case of Smartel & Wms But this authority is a doubtful one in the opinion of Butler & other Lawyers. Evidence ought to be required to prove the execution of the deed if the deed itself is lost.

Possession of land 20 years with the deed is sufficient evidence of a man's claim without any testimony to confirm the deed - In such a case

case if a Jury have brot in a Special verdict "That if the deed was executed & delivered it was done above 40 years ago & that the Plaintiff claiming under it had been in possession during this period" the Court cannot draw the inference that the deed was actually executed & delivered, tho' they have heard the same evidence upon which the jury would be authorized to draw such an inference. We have just seen that possession 40 years with the deed is sufficient evidence of execution & delivery, yet the jury must expressly say that the execution & delivery were legal otherwise the Court would be puzzled to draw such ~~an intricate, complicate~~ a Logical inference from such complicated premises & the verdict would avail nothing. Also in case of trover if the jury have found a demand & refusal to deliver up the property trovered, altho' these words legally imply a coversion, yet the Court are not allowed to conclude that there was a conversion unless the jury have mentioned this in their verdict. — This is one among the numerous instances of a childish fear in the judges of transgressing maxims where there is not even a shadow of danger & is inconsistent with that dignity which they pretend, & which they ought, to preserve.

A Deed without any solemnity attending it except a delivery, may be good as a covenant, altho

it will convey no title. But if the grantee has gone into possession & the grantor brings an action of ejectment against him, the grantee may file a Bill in Chancery & compel the grantor to complete the contract by giving a valid deed & if the grantor has before this given a good title to another, the first grantee tho' he cannot hold the land, may yet bring his action on the defective deed, as a covenant & recover back his money.

To convey land by Will there must be 3 Witnesses & if only one of these can be obtained he will be sufficient to establish the will.

Of Erasures & interlineations

Here made by persons any way interested if ever so immaterial render the deed totally void. But an immaterial alteration made by an indifferent person will not invalidate the deed. Any addition or alteration by the consent of both parties render the deed void for it is said in such case not to be the same instrument that was before witnessed & sealed. If the property might have been conveyed without a writing the erasure would not destroy the bargain tho' it would the writing. As a Bill of sale of a horse, an erasure or other alteration would make void the Bill of sale, yet as the horse might have passed without the writing, the bargain remains firm. — If the seal is broken off by the parties

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unless done in Court, or if it be broken off by any accident, the deed is destroyed. In case of a joint deed given by 2 persons, if one seal is broken off, the deed is void as to both. for it is said that the fact of one seal being off is evidence of a discharge & the discharge of one is the discharge of both. This doctrine however appears to be very unreasonable. Let the seal being broken off be presumptive evidence of a discharge, yet if this presumption can be removed by parol proof it ought not to be a discharge of ~~both~~ either.

These principles are not fully settled.

As to Unsealed instrumts the action may be brot as on a promise & the writing given in evidence. Wherever the covenant is detailed at length & the consideration appears the action may be brot on the promise - but where the consideration is removed behind the curtain, the contract is a specialty & the action must be brot on the writing.

2nd Division of Evidence

Of Parol Testimony

Of persons excluded from being witnesses.

1st Those who want integrity

2nd Those who want discernment.

Under the first head are included persons who are so interested that they are presumed not to give their testimony with integrity.

it being natural for the best men to incline in favor of their own cause. Persons only apparently interested; as a Guardian in an action of an infant, or a Trustee in an action concerning property held in trust, are admitted to testify.

Lawyers make a distinction between interestedness in the event, & interestedness in question; ~~& concerning what shall be considered interestedness in the event, & what interestedness in the question, there is much dispute.~~

Interestedness in the event is where a man is immediately concerned in the event of the suit in which he is called to be a witness that is he is to gain or lose by the cause in question as it goes one way or the other. As if a man covenants with the Pff. that if he gains he shall have a proportion of the profit, or with the Dft. that if he looses, he will bear a proportion of the loss, - in either of these cases the man thus covenanting is eventually interested in the suit & is therefore an inadmissible witness.

Where a man is collaterally interested, as if two men were in similar circumstances & one should bring his action first, the other may be said to be interested in the question

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Such kind of interestedness will in no case exclude a witness according to the English Law as it now stands See Durnford 3rd Volume the Case of Bent & Baker in which this doctrine is fully settled & the 1st Burrow 2251 in which L. Mansfield gives the true reasons in favor of these principles — Before this decision in Durnford the English Law on this subject was extremely vague & the adjudications were altogether inconsistent, sometimes witnesses interested in the question were rejected & in some instances admitted & the same inconsistency ~~of practice among our judges~~ is observable in our adjudications — our judges having followed the old English practice — But it is to be hoped that the present English principle will soon be adopted by our Courts. — Authorities relating to this subject Hard. 532. Roll. 885. Strange 728-595. L. Raym. 396. Com Raym. 191.

Lecture 28th March 3rd 94

If it appear that any use can be afterwards made of a judgment by a witness, which judgment depends upon his testimony he is interested in the event & is inadmissible. But this is not the case where 2 men are ~~bro~~ assaulted ~~by~~

at the same time. One may bring his action & introduce the other as a witness & no use can afterwards be made of this judgmt. but when the other comes to bring his action he may introduce the man assaulted with him as a witness. In case of a forgery of a note the apparent obligor cannot be admitted to ~~swear the~~ testify that the note was actually forged & it is the practice to vacate the note after forgery is proved for the witness in such case would be immediately interested in the event. There is a distinction made in Co. Litt. cited in Hard. 532 unimportant.

Of the admission of Members of Corporations to testify.

Where there is a balance of interest, in those cases where it is evident that the member of the corporation would be led by his interest to swear one way as much as the other, or where ~~he could be more so~~ it appears uncertain on which side his interest leans; in all such cases he is an admissible witness.

In a Public prosecution against a County for damages sustained thro the badness of a bridge, the inhabitants of the County are admitted to testify in the cause on the ground that they are as much interested to have good bridges, as they are to avoid the small share of the damages which the Plf is about to recover & such a prosecution would tend to make them keep the bridge good.

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In another instance a member of a corporation is admitted. Where proof is required to show a man promised a Donation as a Bell for a meeting house, or to establish a School &c. In all cases where the members will be admitted the donation must be such as they are not obliged to supply if the ~~not~~ donation should not be established. for if they were obliged to purchase the Bell unless they established the Donation they would be directly interested. Any member of the society is admitted to testify except the agent who carries on the Suit & there can be no reason why he should not be admitted as he is no more interested than the rest. Testimony to prove a covenant which might have been reduced to writing is not admissible. as if a preacher agreed to take continental money for his salary. when the question come up the members of the Society were not admitted to swear that he made such an agreem[t] for the contract if there was any ought to have been committed to writing.

It is a principle in our Law & the English that where a Stat cannot be carried into execution without admitting interested testimony it shall be admitted. This principle however has been rejected by the Circuit Court. If a man should be robbed he cannot be supposed to carry evidence ~~that~~ about with him to prove

that he was robbed, but in order that the Stat. may be carried into execution he is admitted to testify against the Robber. This is a ~~common~~ rule in the Law of England & in ours till the determination of the Circuit Court. Such witnesses are not suffered to relate any other circumstances than are necessary to carry the Stat into effect. An authority in the 3rd of Mod. 115 speaks of this principle as being fully settled. But it is contradicted in 2 Cases in Strange 1st 316. & 2nd 1187. There are cases of informations where the informer is to have 1/2 the penalty. 2 Roll 683.

In actions of account also the parties are admitted to testify. & this with the set of cases where witnesses interested are admitted when the Stat. otherwise would fail of execution. These are the only instance in which interested persons are admissible before a Court of Law. In event

A refusal to testify when called upon at Law is a contempt of Court for which the offender may be imprisoned.—

In Chancery the parties may both be admitted as witnesses, the Dft always & the Plf. if the Dft pleades to appeal to his conscience for the truth. They are not however witnesses in the same sense as those at Law. It is no contempt of Court for the Dft. to refuse to testify. but in such case the accusation of the Plf. is taken for granted. A Dft shall never be obliged to give evidence if by it he shall

subject himself to a penalty - Yet if the penalty is going to the Plf & he waives it the Deft must then speak or it is taken for granted what the Plf asserts. If a man is called upon to prove the highest degree of baseness in himself, if by it he is not to be subjected to a penalty, he must testify or it will be taken pro confesso. But if the Stat. of Limitations has run upon a penalty so that the Deft need not be subjected, Courts will not oblige him to testify.

By our Stat we have made some encroachments on the Com. Law respecting the admission of Witnesses. As in an action of Book debt both parties are admitted. Our Courts seem to have involved themselves in some inconsistency in one respect. When action has been brot on a Note & the Deft has receipts but not to be found he is not allowed to swear to them yet he may in his turn bring an action of Book debt & charge what he supposed he took receipts for & this he may swear to.

In an action for a private assault the Plf is admitted to testify as to the battery itself & as to the words which brot it on; but not as to the degree of injury. This must be proved by those who have examined the wounds.

Another encroachment our Stat. has made upon the Com. Law. In a case of trespass, the Plf

may testify that he believes the dft cut off wood, for inst., & the Dft is obliged to swear whether he did or not, or else it will be presumed he did - but if he says he did not the Plf can bring in no testimony to prove that he did, as he could in case of the Night Law.

~~Forgeries~~ Where counterfeit money has been received the man is allowed to swear of whom he received it & recover back its value. All these instances are against the maxims of Com. Law -

Where a Plf. accidentally joins a dft. in a suit in order to exclude him from being a witness, the Court will erase such dft out of the Declaration & admit him to testify. If there is not sufficient evidence to prove him guilty, or if the probability is that he is not guilty & there is no other evidence by which the case may be illustrated, he will be admitted.

Lecture 29th March 1th 91.

Husb^d & Wife are excluded from being witnesses for or against each other - This is a general rule & certainly does not correspond with the maxim that they are one - for a person is admitted to testify against himself. Even if they are willing to testify against each other they are ~~not~~ prohibited on principles of policy.

To this rule there are a few exceptions. In the instance of high treason they may be

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witnesses against each other. This principle is founded upon the idea that they are under a superior obligation of allegiance to their ~~Prince. & are therefore bound to this~~

In complaints for personal abuse they are witnesses ~~for or~~ against each other & they are admitted before any other testimony after them, other witnesses may be introduced. — If the Public prosecute a man for a private personal abuse to the wife, she is admitted as a witness — The first case of this kind was that notorious one of L^d Audley's. This authority has been questioned by some common place writers & in one case denied by Holt to be an authority — Yet notwithstanding all that has been said to invalidate it, it is established fully at present (See Hw. 633) & is founded in principle —

By the Civil Law ~~children~~ were excluded from testifying for their parents — but under the English Law no relations ~~are~~ are excluded except Husband & wife.

Attornies, witnesses

Attornies are generally allowed to testify in causes in which their clients are concerned. An attorney may not tell the Court any thing the opposite party said when it is in Proof. That he led on

the conversation but any thing that was said voluntarily he may relate.

Attornies are prohibited by law from testifying against their clients any thing communicated after they are employed & if an attorney is asked a question relating to such circumstances he is not at liberty to answer & indeed no one has a right to ask a question of this kind but with respect to any matters that happened previous to his being employed by the client he is an admissible witness.

Particeps criminis are frequently allowed to be witnesses. There is sometimes danger in admitting them but the evil attending this practice is more than compensated by the good effects. Many crimes which would not otherwise have been disclosed & punished, have been discovered by admitting one of the rogues to testify against the others on condition of pardoning him, ~~& criminal~~

Testimony by confession is good evidence in both Civil & Criminal actions. Tho if a man appears voluntarily & acknowledges himself guilty of a crime & there are no other corroborating circumstances the jury cannot convict him. What a person accused of a crime has said before a court of enquiry, in Eng it must

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be collected from the minutes of the Court & in Con. it ~~was~~ is the practice to obtain it from the mouth of justice; & not from any bystander.

What a dead man formerly said under oath is evidence — yet what he said not under oath, as a general rule, is no testimony. tho in some instances it is admitted. Yet seems reasonable that it should be admitted when it is the best evidence that can be obtained. What a man said in contemplation of death is admissible for it is probable he is as likely to tell the truth in this as in any situation, but if he did not die in that sickness, what he said cannot be introduced nor what he said when he was like to die unless he contemplated death.

What a person has been heard to say concerning the boundaries of his Land &c may be adduced after his death.

When a man's testimony is impeached, evidence may be introduced to shew what he said before — If a person has uniformly told one story not under oath when he was disinterested & under oath tells a different story, testimony may be adduced to relate what he said always before he was put on oath, & what he said first

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will prevail in preference to his testimony under oath-evidence however is admitted of ~~what~~ what a man said previous to his being put on oath to corroborate what he said on oath as well as to impeach it.

Of Persons excluded thro' want of integrity

Persons rendered infamous by crimes are not allowed to be witnesses. Under the class of infamous characters are reckoned those guilty of Felony, perjury, cheating &c In order to exclude them, they must not only have committed, but have been convicted of the crime & the record of the Court must be brot in as proof of the conviction. Barretry is one of the crimen falsi & will exclude a witness if convicted.

Our Courts have made many innovations in the Com. Law on this subject & notwithstanding a man has been convicted guilty of a crime if it can be made to appear that he has sustained a good character a long time since the conviction he is a good witness. This is not the Law of Eng.

A Pardon operates to qualify a man to testify, altho' it appears on the record that he was convicted.

In Eng. formerly no infidels could be admitted as witnesses except Jews - but now all are allowed to testify & are sworn by that

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religion which they may happen to profess. Quakers in Eng. are not witnesses in criminal cases. This extremely unreasonable. Deists upon their principles would not be admitted but as they are brot up in a Christian Country, it is presumed that they, we Christians & can relate the truth. Atheists are excluded.

Under our Law, from the form of our oath no persons can have any objection to take it. Swear by it & accordingly all except Atheists are admitted.

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Children are admitted to testify at different ages in different countries & indeed in the same countries it depending more upon their discretion than upon their age. Some have fixed the period for admitting them at the age of 10. They are allowed frequently to relate their story without being sworn. They are never put on oath till they appear to understand the nature of an oath. In Connec. they are not put on oath till 14.

In Courts following the Civil Law, one credible witness is not sufficient to establish a fact. If the proof is by witnesses, they require 2 & if other testimony is admitted it must be equivalent to the evidence of 2 persons.

In England & Canada. One credible witness is sufficient - yet more witnesses with and presumptive evidence would not be rejected if they could be had conveniently. No quantum of evidence is prescribed by ~~Law~~ our Law it is left pretty much with the discretion of judges as to what testimony may be sufficient in the particular case before them -

As a General rule hearsay testimony is inadmissible. Yet in some instances it is admitted It may be testified what a witness has said before when not under oath. It may also be testified what persons have said concerning matters of tradition as births, boundaries, pedigrees &c When a man's character is impeached, hearsay evidence is admitted In such cases the witness is not to say what he thinks of the man, but must inform concerning his general character among his acquaintances A man's particular vices are not to be brought up to view the Court are only to enquire out his general character. In an action of Book debt evidence is admissible to shew that the Plf is a dishonest man Testimony is not let in to shew that a man is malicious who is carrying on a malicious prosecution. Such evidence was formerly admitted but is now rejected as tending to try characters & not facts Yet a knowledge of a man's character will have great influence upon the triers & if it has influence when they know, why ought they not

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to be informed by witnesses that it may have its proper influence? It is evident to see that there is the same danger in either case of trying characters & not facts.

As a general rule Witnesses are not to relate their opinion but only the facts & from those facts the jury or judges are to draw the inference — It may in numerous cases make an essential difference whether the witness gives his opinion or not as the decision will frequently depend altogether upon the manner in which any thing is said or done — & this can only be found out by the opinion of the witnesses

Cases where 2 Witnesses are necessary —

Two witnesses are necessary to convict a man of high treason. Yet one overt act proved by one witness & another overt act proved by another witness is sufficient

Two witnesses are also necessary to convict a man of perjury on the ground that the testimony of one witness would only set oath against oath & just balance each other. Instances however are supposable in which one witness ought to be held sufficient to convict —

By Com. Stat. all testimony in both civil & criminal cases is left on the footing of same footing as at Com. Law except in Capital crimes. When the consequence of

a crime is to be death 2 witnesses are required or what is equivalent to there. Some have supposed it necessary that 2 witnesses must have actually looked on & observed the commission of the crime but this is far from being the Law. for one witness with corroborating circumstances is many times sufficient & indeed only presumptive evidence will sometimes convict a man. One principle however is fully established that the testimony of one credible witness without corroborating circumstances is insufficient to convict a man of a capital crime.

Interestedness in the Event is proved by two methods 1st By witnesses & 2nd by the oath of the person said to be interested. These methods are concurrent but by choosing one the party is obliged to waive the other. In the latter method by voi dire if he discloses any fact which shews him to be interested in the event, or if he supposes himself interested & bound in honor not to testify, Courts will exclude him, but if the Court think him interested & he says not, they cannot exclude him.

The method of summoning a witness before a Court is by a writ of subpœna, if the

party requesting his attendance has complied with the requisites of the Law, the witness is obliged to attend the Court. His expences must be tendered to him & also his travel to & from the Court & pay for one days attendance. This is our practice. Some English writers lay it down that the party must tender the witness his expences, travel & whole pay for his attendance but it is impossible to know how long he may want the witness & it would be difficult to tender wages just sufficient. It is probable however that the witness need stay at Court no longer than he has rec'd pay for.

If the witness neglects to appear the Law is that he is liable for the damage the party sustained in consequence of his failure. It is extremely difficult in such cases to ascertain the rule of damages for it is altogether uncertain what the witness would have testified. Before a witness is thus liable he must be called by the Clerk 3 times & then his failure & the return of the subpæna are to be recorded.

Of Proof by Presumption

Evidence raised by presumption may be sufficient, but is liable to be removed by contrary positive testimony.

When one fact is fully established

Another fact is the necessary consequence & inseparable from it. This last is said to be a violent presumption. As if it was established that it was clear in the Evening & in the morning no snow on the ground but in the morning the ground was covered with snow, this would be a violent presumption that there had been clouds during the night. A weak presumption is impossible to be removed. Follow the Definition strictly & it is the highest kind of evidence. The old case of a man being found with a bloody dagger running from a dead man weltering in his blood, is cited by some writers as being a violent presumption. yet it is not according to the above definition. for it may be, & indeed in a very striking instance, has been removed. A man had sworn revenge upon B— his acknowledged enemy, was found drawing a poignard from B's breast, & was there when he was dead & covered with blood. He was executed afterwards. The true murderer confessed the crime. The fact was that the person executed happened to pop by the moment the man was stabbed & was drawing out the bleeding dagger when & discovered in this act. So that such presumptive evidence is liable to be removed

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The instance, of a Receipt for the last term in case of Leare being evidence that all former rent is paid, is related as violent presumption but this certainly might be removed tho' in Law it is held Justice

Interested witnesses are said to be admitted only "from the necessity of thing" This is a vague expression & might easily be construed to mean that when no other evidence could be found, this might be let in from the necessity of the thing. But the Cases included under this phraze are settled & are as follows —

1st Where a Stat would be defeated if the interested person should not be admitted.

2. In actions of account

3. In an action against a Sheriff for a voluntary escape the escaper is admitted altho directly interested — for if the Credita recovers out of the Sheriff, he can have no claim upon the escaper This appears rather an unreasonable rule.

4. The case of a rescue the person rescued is a witness against the rescuers —

5. An agent is always admitted to testify that transacted the business of his employer — The agent is deeply interested for in case he swears that he discharged his duty properly, he himself would be liable This is a very important branch of the case of interested persons being witnesses, being in every days practice.

6th Where there are two Trespassers & one is called in to testify in an action against the other.
7. In a complaint against the husb^d the wife is admitted to testify that the husb^d may be compelled by Court to give bonds for his good behavior.
8. The Mother of a Bastard is a witness to charge the Father.
9. Where a Servts fidelity is questioned by the Master, the servt may testify ~~for~~ in an action against the person who he says committed the fault. As where a Servt has been entrusted with his master's property, he is a witness to prove that another took away the property, or wasted it &c.
10. Additions to these cases in Connecticut Book dell.
11. The case of Affrant & Battery.
12. One Stat. which suffers the Plff to put the Dft on oath when it is believed that the Dft committed a Trespass.
13. Where a man is robbed he is a witness against the Robber — This Eng. princip. also not intro. ~~fully~~ in Con.
14. The case of a man's receiving counterfeit money &c.

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An interested person is capable of becoming a proper witness by a release, B^d Bumford 27.
When a person becomes interested after he is called as a witness, his testimony is not good in that party's favor for whom he is interested but is good witness for the other party. Stra. 652. ~~705~~. Burnf^d 27.

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Miscellaneous principles in the Law of Evidence with their authorities —

A Witness may swear to the fact of an entry made by him on paper if he remembers his having made the memorandum. But if he has no recollection of his having made it the memorandum itself must be produced — Evidence may be let in to prove there were other considerations to a ~~writing~~ sealed instrum.t besides that expressed in the instrum.t but this is not to contradict the ~~cont~~ writing. 3 Dunn.d 175.

When a release of all demands is given, it does not release that consideration out of which the release grew. & if part of the consider.n are specified, others may be shown by parol testimony as well as tho' 5 Shillings had been the nominal consider.n This last doctrine I heard recognized by the Sup. Court Litchfield Jan.y 94. R.F.

See a Case in 3 Dunn.d 707. respecting Hearsay evidence in which the Court were Divided.

A witness who absents himself wilfully may be attached for contempt of Court Doug. 510. Stra. 510.

An Executor when naked Trustee is a witness Doug. 134.

It is a Rule that if a Party offers testimony inadmissible because not the best the nature of the thing admits of, the Court may look strictly

on it, & if it is against the party offering it may be read Doug. 752.

The Declaration of a dying man adm. 3 Burr. 1253 1253

Parol evidence is admitted to prove that the parents intention was, that a portion should not adeem a Legacy. 2 Brown Chan. 163. & that Legacies given by a Codicil were meant to be accumulative 2 Brown Chan. 519. 521.

Subscribing witnesses to a Will must be called if they can be procured & if not to be found their hand writing proved. It has been a great question in Eng. Whether their testimony is admissible to contradict the evidence of the Subscribing witnesses? And is determined in the affirmative 1 Black. Rep. 365. 3 P. Wm. 396. but the subscribg witnesses testimony is first to be introduced

Length of time is sometimes presumptive evidence of the discharge of a Bond 1st Black Rep. 532. Courts have never gone below the time of 18 years

When a subscribing witness is Bail he is compellable to testify. Stra. 406.

A person apprehending himself interested when he is not is no witness Stra 129.

Parol evidence of the contents of a deed when admissible see 1st Very 505.

Where an expression of the Testator is ambiguous, parol evidence is admd to show what

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the intention was, even against the legal construction of the expression 2 P. Wms 136. In this case parol evid. was admd to shew what the testator meant by heirs on the mothers side & the meaning was against the legal construction.

If a deposition of a disinterested person is taken & before trial he becomes interested the Deposition is inadmissible if in favor of that side on which he is interested. See L^d Raym^d 1008. It is curious to remark that a person who is heir to the Estate of an old man just ready to die is a good witness & not consid^d interested respecting any matter concerning the Estate, & yet he who has an estate in remainder let it be ever so distant in expectation is rejected as an interested witness & ~~therefore inadmissible~~ we startle at first an unreasonable principle & conclude there must have been a flaw ~~[illegible]~~ in the wisdom of those who formed it, ~~[illegible]~~

Endorsements are sometimes admitted to rebut the presumption of a Bond's having been paid when the legal length of time has run upon it. The Rule is that when the en-

Endorsement was made before the time had run upon the Bond; such an endorsem[t] rebuts the presumption of the Bond's having been paid. but if made after the 12 years had run it is otherwise. This however is an unreasonable distinction for it is in the power of the obligee who keeps the Bond to make the endorsem[t] when he pleases.

The evidence of a single witness corroborated by circumstances, against the 29th's answer in Chancery, is sufficient to found a decree upon. 1 Brown Can. 51. It is the practice in such case for Chanc[r]. to send the witness & the 29th's answer to a Court of Law & jury & after the facts are tried they are sent back to Chancery.

The verbal declarations of the vendor at the time of the sale are not admissible to contradict the written conditions. see Black. Rep. Henry. 287. We recollect one case which probably he would have obtained had he known of this authority. Lane published lands for sale freed from all incumbrances when in fact they were not thus free & the Court suffered him to let in testim[y]. that he had told many of the purchasers incumbrance under which the land lay & he obtained his cause.

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A person who has contributed to give currency & credit to a writing shall never be admd as a witness to impeach it as in case of usurious contracts &c

The following authorities respecting the admission of witnesses interested in the question viewed together shew that they are inconsistent & irreconcileable Salk 283 Salk 285 Strange 595. hearing of the Note

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There are instances on which a persons general character may be enquired into not only the characters of the witnesses & parties, but of other persons & not only general characters but particular facts respecting characters may be admitted to be proved. All these cases may be included under this General Rule. Where a ~~person~~ character is put in issue by the pleadings whether it goes fully to a recovery or defence or only in mitigation of damages, particular facts or a general reputation may be enquired into. But you are not to enquire to furnish evidence that it is probable that the thing charged was done. So instance in slander A. sues B. for charging him with being a thief. A. wishes to prove that B. is a slanderous malicious character. Can he do it? Examine

for what purpose he wishes to make this proof — when he has made it, will it entitle him to damages without proving the charge? Certainly not. Will it entitle him to greater damages that being the case, after he has proved the charge? Not greater than he had received if B had been a better character — It is not then to affect the damages but for another purpose, to furnish evidence that he actually slandered, ~~him~~ to render it probable ~~he~~ that he is guilty of the charge — this is to come in aid of the evidence to induce a belief that the Plf's declaration ~~is~~ is not ill-founded — but for such purpose, it is not within the rule laid down, & is inadmissible, tho' for another purpose it might be conclusive — On the other hand B wishes to prove that A. did steal as stated in the Declaration — Shall he prove this? Examine again for what purpose the proof is wanted — will the proof of this fact exonerate B from damages? It certainly will — it is a complete defense & the proof is admissible — for further illustration we will suppose that if B. proved he stole it would not be a complete defense yet would it lessen the damages? In such case the proof is relavant & admissible — for tho it does not fully justify yet it lessens the damages. — Again suppose he cannot prove any particular theft yet A's general character

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is that of a thief — Shall A. prove it? Will the damage be as great to charge such a man with being a thief, as a good character? Certainly not. It is therefore admissible.

The case of a Mistress who preferred her Bill to recover her annuity from the man who kept her may illustrate this principle & herein of the distinction made between modest & immodest women before the Debauchee received them. The Case of a Bill brot for a divorce will also explain the rule — and the case of an action brot by a parent against the man who debauched his daughter, the Dft may in such case introduce proof that she was of ~~doubtful~~ a lewd woman before &c

Parol Evidence is admitted to vary an Equity Where the Legal construction is one way & the Equitable is another in such case parol testimony is introduced to prove the Testator's ~~gratuitous~~ intention that the legal construction shall prevail.

There is a vague maxim that Affirmative testimony shall prevail over Negative. This however is far from being always the case. It is true so far that if a number were in a company & 1/2 of them or even fewer should afterwards swear to a fact done in the company & the other 1/2 or more should swear they did not see

see the same fact, in such case the Affirmative would clearly prevail - But suppose 20 in the company & one swears to the fact while the others appear & swear they were in the same company & did not observe the fact but that they could not have failed to observe it, if it had been committed - Then the negative would prevail over the Affirmative for it would be presumed that the other witness swore falsely &c — The Affirmative must always be regularly proved - & There are cases where the negative must be proved because the Law in such case presumes the affirmative

Where a suit is brot against a Public officer as for inst. a Clerk of the Court for refusing to give a man a Copy of Record which was his Duty to have done the Plf. is first to prove the office did refuse & after he has adduced his evidence the Clerk may introduce testim. to prove that he performed his duty & did deliver the copy when demanded - The Law presumes in this case that the Clerk did his duty, untill this presumption is removed -

What the parties have agreed to in the pleadings needs no proof -

The issue is not required to be proved exactly as it appears on the pleadings - the substance of it is all that is necessary - As if an action is

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brot for cutting a certain number of trees & not guilty is plead — the Plf if he can prove that only so the number were cut is entitled to a recovery. Or where an action is brot for 20£ & the Dft pleads that the Plf owed him 10£ — if it should turn out on evidence that the Plf owed him only 20£ or any sum over that 20£ whether it falls short of the sum in the plea or shoots over it is immaterial if it is sufficient to Ballance the Plfs demand the Plea is good & the Plf is not entitled to a recovery — Again where Usury is plead viz — That the Plf reserved more than 6 p^r^ Cent viz 10£ the plea is answered & the jury find that only 7 p^r^ 9£ was reserved yet they will bring in "Usury" for their verdict — If what appears on the part of the Dft is sufficient for a complete defence, altho' not in the same terms as he expressed himself in his plea yet he does not loose the benefit of his plea but it is a good defence. —

If evidence is adduced which you suppose falls short of proving the issue on the part of your antagonist, you can as usual leave it to the determination of the jury, or if you chuse demur to such evidence and if it be written evidence there must be a joinder in demurrer. — If you judge the evidence as coming from a wrong source as an interested person &c or if you judge

judge it impertinent to the issue, object to the admission & if admitted file your bill of exceptions to the opinion of the Court admitting such testimony which must be stated & if coming from a wrong quarter, you must state the circumstances of the witness.—

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Of Bail

Of Bail as under the Law of Connecticut

The Law of Bail in Connecticut is the best system that is known of & if well understood will lead to a thorough knowledge of Bail as it prevails in the other States & in England

Bail includes all cases where a man is bound for the Pff in a suit to pay costs in case he does not maintain his action, or for the personal appearance of the Dft—

The Pff must procure bonds for prosecution: so that if he should not be able to respond the Bill of costs when the judgm[t] is against him, the Dft[s] may come upon the bondman. & this provision of the Law is for the prevention of vexatious Suits. The Bondman acknowledges himself bound for a sum sufficient to discharge the Bill of Costs in case the Pff should fail to support his action & his property should be insufficient to pay the costs. The Constable is to look for the Pff's property & if he returns a non est & does not chuse to take his body, the Dft may then bring

Bail

his action against the Bondsman either a Scire facias or an action of debt on bond at his election. But let the bond be as large as it may the recovery is only commensurate with the costs. In case of a summons if the Plf belongs out of the State he must procure bonds to secure a bill of cost whether he be poor or not but it is the practice not to require bonds of a man who lives in this State where it is evident he has property sufficient when a summons issues. But in all cases where an attachment issues the Plf must give bond, rich or poor. A writ of Attachment cannot issue without bonds an idle practice has obtained here not by any means warranted by the Stat for the Justice to take the Plfs own bond. This is certainly perfectly futile & unavailing for the execution will answer all the purposes of such a bond & indeed more. The original & true idea was that if the Plf chose the harsh remedy of attachment he should give bond not only to secure the costs alone, but for the damages the Deft might sustain in being arrested by a vexatious action. But the practice now is only to take bonds for the costs only.

In every case where a man appeals from a lower to a higher Court he must give bond & procure somebody to join with him his own bond is never sufficient. The condition of the bond is that he make good all damages if the other party prevails. This bond is sometimes a security for costs & sometimes for the debt also — Ordinarily it is only a security for costs As if an appeal is made where the Plf in the judgm^t below was to have 100£ for damages if it is confirmed in the upper Court it is easy to see that all the damages the Appellee has sustained by the appeal is the costs & there were all the bondsman bound himself for. There has been a dispute whether such bondsman is bound for former costs as well as those subsequent to the time the appeal was made & the Court has decided that he should be liable for the costs previous to the appeal's being made. with how much reason is another question.

When the Bondsman is liable for debt as well as cost. This happens where the appeal is not prosecuted by the appellant. We have seen that the condition of the bond is that the Bondsman make good all damages &c & it certainly is an important injury to the Plf to appellee to fail of prosecuting the appeal. for by the appeal he has

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lost all benefit of the former judgm[t] it being the nature of an appeal to extinguish the judgm[t] below so that no execution can issue from it. Where the Appellant carries thro the appeal the bondsman can be only liable for costs, but where he fails to prosecute them for debt also — It is a doubtful unsettled question whether, if the Appellant should become a Bankrupt after the appeal, the bondsman should be liable for both debt & costs. When we examine the nature of the bond it is most natural & reasonable to suppose that the Bondsman should be liable; for he was to 'indemnify the Appellee for all damages in consequence of the appeal' & it is easy to see that had [no]t the appeal been made the appellee might have obtained his debt yet the current of opinion seems to be the other way it being said to be a misfortune happening while the appellant was legally pursuing his rights but the strength of this argum[t] may perhaps be questioned.

Of Bail on Arrests

This is of 2 kinds 1st Bail to the Officer for the appearance of the Deft on the first summons & 2nd Bail given to the Court after the Deft has complied with the original summons. The former is called Common Bail & the latter Special.

Of Bail to the Officer on arrest

It is the duty of the officer in such case to take a sufficient bail for the appearance of the Dft at Court & if he does not take sufficient bond he is liable at the suit of the Creditor. If the Dft fails to appear the Bond is not yet forfeited certainly - judgment may go against him & his propy attached, or the Dft may deliver himself up during the life of the execution, or the the Bondsman may ~~deliver him from~~ compel him to appear & in all these cases the Bondsman is clear. The officer may also take the Dft on the execution which is in effect the same as tho he had surrendered himself -

But if the Dft neither surrenders himself nor is delivered up by the Officer & a non est is returned both as to his body & property then the bond is liable for Debt & costs. This is an admirable provision in our Law, to suffer the Dft to remain at home managing his business & providing for his family instead of being confined ~~in the Gaol~~ of Prison & this with no disadvantage to the Plf in the suit.

Of Special Bail or bail to the Court

If the Dft appears in Court on his summons he is then in the protection of the Court who deliver him to the Sheriff yet that he may be still at liberty the Law allows him to procure ~~give~~ bonds for his appearance at the rendering of judgment & if he fails

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to appear the bond is not ~~of consequence~~ forfeited provided he surrenders himself during the life of the execution &c &c — In the English Law the privilege of the Dft is extended still further for if he does not surrender himself during the life of the execution &c a scire facias is brot on the bond & if the Dft be surrendered up before judgment is rendered on the scire facias the bond is discharged upon payment of costs —

Whether the Bail is liable or not depends upon the return of non est inventus & with respect to this there is frequently much fraud practised the officer by taking advantage of a time when the Dft is not at home, may return a non est unfairly & pretend the Dft was not to be found — In such case if it appears that the Plf had any hand in obtaining this fraudulent non est the bond is discharged but if there appears no fraud on the part of the Plf the non est being returned unfairly by the officer own fault ~~& incorrect, it seems to be law that~~ the Bond is liable, however ~~unjust it may appear~~ yet the bondsman has his remedy against the Officer. — If the officer has taken insufficient bail he is liable with a single exception if the bondsman was apparently in flourishing circumstances when he became bail ~~the officer is excused~~ but afterwards becomes a bankrupt the officer is

very justly exonerated.

When the officer has taken Bail & the Defd. does not appear, the officer must assign over the Bond to the Plf. that the action may be brot upon it. It is the practice to bring the Suit in the name of the Officer, tho' it is apprehended not to be ~~an innovation~~ the proper method.

The mode of recovering upon a Bail-bond is by action of Debt on bond, or by a scire facias, & the rule of damages is the Debt & costs.

Of other Bonds in the nature of Bail.

When property is taken by attachmt it may be released by bond, as well as the body. When bond is given in such case, the property attached is not to be replevied. The bond is entered on the writ of Replevin & is to respond all damages. This again is an excellent provision that the Farmer may keep his Oxen &c & farming implements & the tradesman his tools when attached. All execution is issued against him. Then if non est is returned the bond is liable.

If an attachmt issue for 100£ & an horse only valued at 20£ is attached & replevied & the Defd becomes a bankrupt, there has been a ~~question~~ question whether the Bondsman is liable for the 100£ or for the value of horse only. Nothing can be more simple & easily solved than such a question. Look at the nature of Bond. It is to answer all damages

Bail

The Plf has sustained ~~in consequence of his having delivered up~~ his ~~not~~ liveries upon the house which he held as a pledge by the bondsmans interfering & giving bond Enquire what those damages are — 20£ clearly for that was the value of the horse that was attached if this was the only damage why make the bondsman liable for more — The question however is as yet unsettled & the dispute arises from the expression in Statute tho the spirit of it is supposed by Mr Reeve to be clearly in the bondsman's favor.

Of a Bond upon a Writ of Error.

This also is in the nature of Bail — An Statute formerly required no bail upon a Writ of Error. a Stat however is lately made which regulates the proceedings upon a writ — if a bond is entered upon a Writ of Error the execution obtained in the lower Court is superseded & extinguished but if there is no bond the execution remains in force & if the Plf in Error absconds the bond before taken is liable to respond damages.

Bond upon Audita querela

This Bond is of the same nature of a Bond upon a Writ of Error but different in its operation As where a judgmt is rendered against a man for a debt & the officer levies the execution upon the Dft.'s & commits him to jail — The Dft says he has discharged the debt & may have an audita querela — This discharges the Dft. from jail

till the Sitting of the Court where the question is tried & if the audita querela is well founded the Ptf recovers damages But he must have obtained a Bondsman so that if the querela is ill-founded & he is unable to pay the Costs his bondsman may be liable—

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There may be in Cases in Connecticut where one party will have Securities for his costs This must be where an Appeal is made The Bail on appeal we have seen is liable for debt & costs in case the appeal is not prosecuted & for former costs previous to the appeal & the Special Bail is also liable for the costs previous to the appeal So that the Appellee has a concurrent remedy he may obtain his costs at the lower Court out of the Special Bail or he may recover the whole out of the Bail on Appeal or if the Appeal is prosecuted ~~the~~ the case will be the same only the Bondsman on appeal will be liable for costs only & not for the debt—

English Bail

Of the Power of the Bail over the Prisoner —

In England when a man's body is arrested & a bond is given the Bondsman takes a piece of paper upon which the Bail is mentioned called the Bail piece The use of this is that when

Bail

the man for whom he is bound is about to escape or has actually escaped, the Bondsman may retake him & commit him to prison by showing his Bail piece & no one has a right to rescue the prisoner any more than if he were taken by the Sheriff. But if he has no Bail piece he has no authority to take the Prisoner & any person may rescue him. In Con. we have a Certificate from the Clerk of the Court of the nature of the English Bail piece but it is unnecessary the Prisoner may be taken without it. The Superior Court have decided that the certificate was not necessary & yet that those who rescued the prisoner were justifiable when there was no certificate — for as the Bondsman appeared to have no authority the rescuers had reason to suppose their neighbour was taken by illegal violence.

2 Ens. Bail is universally taken on Mesne Process only & not on Execution, tho in certain cases where a Writ of Error is pending the Court of Kings Bench will take Bail.

Bail is taken by a Judge or by an Officer. When the Plf is about to bring a suit the Dft may go with him before a Judge & he will take Bail for the Dft's appearance. This must be by the consent of both parties.

Bail

In Com. The Officer is obliged to accept of bail if suffict & if he refuses he is liable to an action & it has been a question whether it should be an action of Trespass vi et armis or an action on the Case but now settled to be the latter & this is Law of Com. Cro. Car. 196 2nd Saund. 59. Vent 35. 85 Salk 99. L. Ray. 425.

This bond is assignable to Plf & the Plf sues in his own name tho in Com. we have seen the practice is to sue in the name of the Offic. If the Plf dislike the security he moves the Court that the officer bring in the body & the Sheriff is amerced & proceedings stayed against him till he pursues his remedy against the Bail 1 Vent 85. L. Ray 399. Str. 423.

The principle of our Stat is the same in substance, tho' different in the mode of proceeding. The Sheriff is not amerced but if the bond is insufficient he is liable to an action &c

Of Common Bail & Special

The Eng. Com. Bail is different entirely from what we denominate Com. Bail. Their's is merely nominal Rich'd Roe & John Doe & The same is the Com. Bail of N. York. This is taken when the debt is under 10£. In Covenants &c & all debts certain above 10£ Special bail

Bail

is taken but not commonly in actions of Slander, Trespass, Assault & Battery &c in all which Cases the damages are uncertain. Yet frequently when Bail is given to Court tho the action sounds only in damages yet if it is presumable that the damages if any thing will amount to more than 10£ Special Bail will be taken. Tho in an action of Slander no instance is known of Special Bail being taken. Ld. 2 Vo. 307. Roll. 333. Le. 39. No Special Bail is taken in an action on a Penal Statute.

An Executrix is not holden to Bail & his body may not be arrested.

In an action against Husb & Wife they may both be arrested & if the Husb escapes out of jail any way the Wife must also be let out &c.

Of the Proceedings on Bail

When a non est is returned a Scire facias issues against the Bondsman. Upon the Officers return of Scire facias if the Bail is lost in the bail is discharged. Or if one Scire facias goes out & a return of a non est is made & a 2nd issues with a like return yet if during the life of the Executrix 60 days on the last Scire facias the principal appears

the Bail is executed

The death of the Principal before the return of the Execution against him is a discharge of the Bail.

There is an Authority in Barnes' Notes page 80 to prove that the Officer, if the Bail was sufficient when he accepted of him but afterwards became a Bankrupt, is not liable.

If the Plf neglects during two terms to file his Declaration the Bail is discharged.

Where Bail is taken in B. R. it is for what shall be recovered but Bail in Com. Pleas for a certain sum.

When Judgmt has been rendered in favor of the Plff & afterwards that judgmt reversed it has been a question whether the Bail was discharged. The reasoning in favor of the discharge is that by the judgmt the bail was discharged & therefore the liability of the bondsman never can revive, by the old maxim that when a right is once suspended it is extinct. On the other hand it is said that the reversal completely wipes the judgmt out of existence & Cro Jac. 95. Moore 356.

Defence of the Bondsman

1st Defence - That the Principal surrendered himself up 2nd That he was taken in Execution. 3d That no Exn had ever issued against the Principal

Bail — Law Merch^t

1. Satisfaction of the Judgm^t, or if reversed
That there was no judgm^t nul tiel record—

Where judgm^t is obtained against both Principal & Bondsman the Plf may sue out which he pleases Cro. Jac. 320.

Where there are several Bondsmen, all or either may be sued 1 Lev. 226.

If the Plf sues out Ex^on against the Bail & gets no satisfaction, he may then sue out ex^on against the Principal Cro. Jac. 542. 1 Sid. 107. 1 Vent 315.

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Of the Lex Mercatoria, or Law Merchant

The Law Merch^t is a rule of conduct observed among Merchants respecting Mercantile matters It is not confined to any particular nation but consists the Rules of Law observed by the Merchants of the commercial all nations. It is not properly called a custom of Merchants for this would bring it under the Law Merchant merely an exception to the principles of Common Law, as the custom of Gavelkind &c is adopted by the particular favor of a Legislature to a particular province but it is a Law governing a whole class of men, Merchants & concerning particular transactions viz. Mercantile & is independent of the principles of Common Law It is true there are

are certain contracts not made by Merchants nor upon commercial matters which are governed by the Law Merchant as Bills of Exchange & Policies of Insurance. The Law Merch^t is a General Law of the Land & not to be proved as Customs are in different places & if there is any variation from this general law such variation is a custom, & proveable like other customs and are to the Law Merch^t what Customs are to the general Com. Law. The Law Merch^t is a much more than grown up much later & is a much more rational System than the Com. Law. The principles of it are collected by Judges from the usages of Merchants by Courts & their adjudications are the Law Merch^t when relating to commercial transactions. And sometimes Stat^s have interfered but Statutes are not the foundation.

Courts when judging according to the Law Merch^t are never fettered in the least by the Com. Law. The Law Merchant differs from the Com. Law in three several respects 1st No consideration is necessary to the validity of a contract. 2nd Any fraud in the consideration wholly abolishes the contract. 3rd A release of any kind unattended with satisfaction, given to one part ner is no release to the other 1st Parol evidence is admissible to vary the operation of a writing

& this where there is no fraud— 5th There is no right of survivorship
Jus Accrescendi among joint Merchants—
Of the first— "no consideration is necessary". At Common Law there must be a consideration & a peppercorn is sufficient but what reason can there be why "no consideration" should not be as good as a peppercorn? The Law Mercht has exploded this inconsistent doctrine.

Of the 2nd Difference— The least fraud in a commercial transaction vitiates & renders it void— when at Com. Law fraud in the consideration of a contract does not make it void but the party is driven to Chancery to obtain relief. A mercantile transaction must be pure & unadulterated & suppressio veri vitiates it as much as suggestio falsi. It may be remarked however that the concealment of a man's speculations in his own brain, tho' by this means he may happen to obtain an advantage in a bargain with another, yet there have no influence in vitiating a contract for ins. A man has a Ship in Europe & from the accounts in the public papers he has determined in his own mind that war is inevitable between a European power & this country & immediately has his Vessel insured without communicating his sentiments

to the Insuring Master. This would not vitiate the insurance, it being a matter of hazard for the Insurer had the same facts before him & probably might have been determined in his mind that no war would take place. But if the owner of the Ship had received private intelligence of a declaration of war & concealed this from the Insurer it would completely vitiate the policy of Insurance.

Of the 3d Difference. It is a principle of Common Law that where there are two joint Debtors & one obtains a release no matter how with or without any satisfaction, the Release is good as to both. But this is totally different from the principle of the Law Merchant. For by this system if one joint Debtor obtains a release unattended with satisfaction, it is no release to the other, but the Creditor may at any time release the one & hold the other.

Of the 4th Difference. It is a maxim in Com Law that no parol proof is admissible to vary the operation of a writing. But in the Law Merch this is done wherever it appears that justice requires it. Tho this is a very vague principle & there is great difficulty to draw the line where to admit & where to shut out. So that this alteration from

the Com. Law is apprehended to be no improvement.

Of the 3th Difference — The Jus accrescendi or right of Survivorship which prevails in the English Com. Law is unknown to the Law Merch. But if one partner dies his Estate descends to his Executor & this is the Com. Law principle of Connecticut — The Ex. of the dec. partner Cowp. is in all respects tenant in common with the 115. Survivor with the exception that the Survivor has the sole right of suing & he alone is liable to be sued. The old authorities maintain that the Executor might join in suits but as the Law now stands he cannot & this is owing to the form of the action. The Ex. may release & receive debts & take property &c as a tenant in Common — When the Survivor has sued for a debt & recovered he is liable to the Ex. in an action of Colly. 111. account for one half of the money — & when the Ex. of the dec. partner has papers which the survivor has a right to & will not deliver them up he may be compelled in Chancery to deliver them to the Survivor that he may have the means of settling his accounts properly.

If both partners are dead leaving Ex.rs the Ex. of the last dec. partner is alone entitled to sue & alone is to be sued just as we have already seen the Survivor was —

If however both Partners die at the same moment actions may be brot by both Exrs If the surviving partner becomes a Bankrupt the Exr of the Decd Partner is liable to a suit in Chancery, tho no reason can be given why not at Law. A Judgmt debt against the Survivor is a Partnership debt 2 Ivery 265. Salk 444.

Formerly if there was an execution against a Merch in Partnership, as a private man & not as Partner, the Officer was first bound to search for private property before he could seize upon the joint estate. But the practice is at present to levy on either the private or Partnership property at the Officers election. The Propy when taken is sold at Vendue & the vendee bids off the goods at half price & becomes a tenant in Common with the other Partner as to the goods purchased by him & the property is by this means kept together undamaged & there is no disadvantage to the other Partner arising from the Propy being sold under value. Formerly it was the practice for the Officer to sell the estate to the amount of double the sum sued for & deliver over the one half to the other Partner & the other to the Creditor. Salk 392.

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Where 2 Merchants are in partnership they posses 3 different estates each one's private property & the company property. When the property is suffict in each several part to discharge the private debts out of the private property & the company debts out of the company property, this must be done

A & B are in partnership B is worth no private property & the company property is insuffic to discharge the company debts A has private property more than suffic to discharge his private debts these must first be paid & the surplus of his property is a fund for the company creditors. But if the Company property is more than insufficient & A's private property will not discharge his private debts the private creditors may come upon the Company estate —

These rules are applicable to our average law

Lecture 36th March 13th A° 1794

Of Bills of Exchange &
Promissory Notes

A Bill of Exchange is a Letter to a man requesting him to pay over money to a 3d person, or his order — i.e. to this 3d person or such person as he shall appoint by endorsing the Bill —

that is by writing his (the third person's) name on the back of the Bill. The writer of the Letter is termed the Drawer - the person to whom it is written, the Drawee - the 3d person to whom the mony is payable the Payee. If the Letter is accepted the Drawee is called the Acceptor. If the Payee endorses it to any person such person is the Endorsee & whoever has the Bill is the Holder.

Such Bills are either payable at sight that is as soon as delivered to the drawee - or after a certain number of days, or months - or more frequently at Usance or double usance - 'payable at usance' means at a certain length of time, according to the usages of different places. In England the usage or Usance is at 30 Days from the Date of the Letter. When payable so many Months hence Calendar months are meant always. After the Bill becomes due 3 days of grace are allowed & if the last day of grace happens on Sunday it must be paid on the Saturday before the Monday after will not do. Tho the Com. Law principle is different from the Law Merch in this respect. When a Bill payable on sight there are no days of grace

Law Merchant

Lee Beawes on Law Merch.t

Formerly there was much dispute about the words "date" & "day of the date". The idea that anciently prevailed was that by the expression "so long from the date" the day in which the Bill was written was included. & that "so long from the day of the date" excluded the day in which it was written. In a Case in Cowper 714. This doctrine is discussed & settled by L.d Mansfield & he gave it as his opinion that they meant the same thing. as authorities on the subject were contradictory the Court had a right to settle the doctrine as they thought reasonable, & said they should consider it inclusive or exclusive as they pleased, & as justice required, or as the intention of the parties appeared to have been. If it could be consid.d exclusive it might work some mischief in England in a contract of freehold estate. for the estate in such case would be commencing in futuro & void. This old maxim would be overset at once. This however is the Com. Law in the Law Merch.t The expressions "on the date" or "the day of the date" both mean inclusive. L.d Raym.d 281. Str. 829.

Promissory Notes are a direct engagement in writing to pay a certain sum at a certain time limited to a person mentioned in the note or his order & frequently "to the bearer" ~~generally~~. In Eng these are made assignable by the Stat. of Anne. Before this Stat. they were consid.d only as evidence of a simple contract & were not negotiable. 1 Salk 129. 2 Ld Raym.d 757.

In Con. ~~as~~ (the Stat of Anne having no operation) Notes of hand are not negotiable.

The County Court in Vermont have decided in several instances that Promissory notes are negotiable & judge Chipman of that State has written a treatise in support of the idea that they ~~are~~ ought to be negotiable on principle ~~& generally at~~ as the law merchant & even at Com. Law, before the Stat. of Anne & has urged many reasons convincing & all could be urged in favor of his opinion.

In Con. Several attempts have been made in the Gen. Assemb. to make them negotiable but unsuccessfully.

Any person besides a Merch.t may bind himself by a Bill of exchange — It has been

been a question whether an infant could bind himself by a Bill of exchange? He may might by a Promisory note before negotiated But to suffer an infant to be bound by Bill of exchange or a Promisory note after negotiated would completely defeat the Law in favor of infants - for all enquiry into the consideration of Bills of exch. &c is precluded & to suffer an enquiry into them in any instance would make men suspicious of taking them & soon stop their free circulation: Carthew 82. 160 - 2 Vent. 292. It has been a question also whether if the Bill was expressly for necessaries, the infant might bind himself? It is extremely evident that he ought not. for were this the case all infants who wished to contract would express in the Bill that the consideration was for necessaries & as no enquiry would be allowed into the true value of the necessaries the infant would not be protected, but the Law in this favor totally counteracted - infants would be just as liable to be imposed upon whether the Bill was expressed to be for necessaries or not. my consideration of

When there are joint traders a contract made by one is binding upon all. 1 Salk 126.

There is one difference to be remarked between Bills of Exchange & promissory notes in the former the Drawer & Drawee are two different persons whereas in a Promissory note the writer is both Drawer & drawee - The note being consid^d in the light of a Bill drawn by a man upon himself, accepted by him when drawn 2 B. & A. 4 to. Com.

A note to "one or order" has been decided to mean the same as "to one's order"

A Promissory note "to one or bearer" renders it negotiable of course, the Bearer, whoever he may be, being entitled to the money; ~~on the face of the note by delivery to the Drawer & so on~~ It is rendered negotiable by delivery without Dr. other respects endorsement ~~is necessary~~ otherwise they are like Bills of Exchange 1 B. & P. 481. 3 Burrow 1516. 1 Bm. 452.

Of Bank Notes & Draughts upon Bankers

Bank notes are consid^d as money itself - In the hands of a bona fide possessor, altho' taken from a mala fide possessor a Bank note is good. A tender of a Bank note is good ^ by the Court and Jury 3 Dunf 554.

Draughts upon Bankers are not so valuable as Bank notes - If the Banker becomes a Bankrupt ~~the day~~ & the payee has called upon him within a reasonable time (after receiving it) the loss is not

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the Payee's but the person's of whom he receiv-
ed it. What this reasonable time is, there is
much dispute - but it is generally fixed in the
place where the note is given. What is a rea-
sonable time is a Question of Law. The Jury
should find a Special Verdict & state the
facts & those facts the Judges are to de-
cide the question.

All the cases in the Books are of
transactions in Cities, between parties belong
ing in the same city. 1 Str. 445 & 6. 5 5 0 2 Str.
910. 12 48. 1175. Law Merch.t by Beawes 482.

There has been a question whether in an
action on a Bill of Exchange or Promissory
Note a consideration need be alleged. By
the former authorities it ought but it is
now settled that none is required to be al-
leged or proved. 2 Black 445.

Qualities necessary to a Bill of Exch.ge

1. It must be for the Payment of Money
Str. 1272. 2. It must depend upon the personal
credit of the Drawer & not upon any partic-
ular fund. If drawn upon a particular fund
it cannot be negotiated. There are instances
where Promissory notes have been drawn upon the profits of a
fund in the hands of the Drawer & consid.d negoti-
able. Str. 1211. 762. Doug. 571. 2 Ray.d 1214 7. If the
fund is in the hands of the Drawer of a note, the note is good.

2 Ray. 1361. Str. 394. 3 Wils. 207.

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A Bill of Exchange must not depend upon a Contingency —

It is not only necessary that a Bill of Exchange should be for the payment of money, & depend upon the personal credit of the drawer and not upon any particular fund — But it must not depend upon an uncertain contingency. 3 Wills. 213. 2 Raym. 1362. Str. 1151. The contingency of time is not meant for Bills frequently depend upon this & besides, a time hence, is a certain contingency that will happen — & a Bill may depend on a contingency that is certain to happen & this certainty need not be physical but if it is morally certain to happen the Bill may be good 1 Wills. 263. If a man should draw a Bill to be paid on the return of a Vessel it would not be negotiable, owing to the uncertain contingency of the Vessel's returning — tho' if such contingency should happen the Bill would be a good contract & binding between the parties Black Rep. 1072. But if the Bill was payable on the payment of a debt due from Government, tho' there is not a ~~physical~~ certainty physical certainty that so —

Government will pay the debt, yet as it is morally certain, the Bill is a good one & negotiable.

Of the Form of a Bill of Exchange

The validity of a Bill does not depend upon any fixed set of words. The FORMS are very various — The requisites that have been mentioned are absolutely necessary — "For Value Recd" is totally unnecessary — for this Stamp is only evidence of a consideration & we have before seen that a consideration is not necessary to a Bill of Exchange. 2 Mod. 267. 2 Raym. 1556. 2 Ray 1326. 1396.

There has been a Question whether the insertion of "order" or "Bearer" was necessary to a Bill of Exchange — Those cases where this question would otherwise have been determined have happened to turn upon other points 2 Wilson 253 — It is apprehended that Bills are not negotiable with[out] any of these expressions. ~~The Drawee was formerly supposed to be a debtor to the Drawer & the Drawer to the Drawee but this is not the necessary point of light in which to consider it for after the Bill is accepted the Drawee is sometimes considered as indebted to the Drawer the sum~~ 3 Mod. 167.

~~of the Bill. Here is an instance of the drawer's recovering of the Drawee for not paying after accepting it.~~

Let us for a moment view the Bill as accepted— As soon as it is accepted the accepter becomes liable for the sum on the face of the Bill, to the payee, or the indorsee, or the holder, as the case may be. The payee may bring his action against the drawer on the drawee's refusal to accept— The holder may sue the drawee, or the drawer, in his own name— & if the Bill has been indorsed thro a number of hands, the last indorsee may sue whom he pleases viz. any preceding indorsor, the drawee or the drawer—

The Manner of Acceptance

It was formerly a Question whether the Acceptance should be written or not— but it is now settled that a verbal acceptance is a good one. If the Drawee, when he accepts can be consid[d] as promising to pay the debt of another person, it would seem as tho' a verbal acceptance would come within the Stat. of frauds & perjuries, & be consequently void, but it should be remembered that this Stat. does not govern

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Mercantile transactions & altho it shou. govern them, such promise could not be consid^d^ a promise to pay the debt of another person, if it can be presumed that the Drawee was indebted to the drawer as is frequently the case. 3^d^ Bur. 1671.

If the time limited for the payment of the Bill has elapsed before the payee offered it & yet the Drawee accepts it it then becomes as a Bill on sight So this point See 3^d^ Bur. 1663. 1 Atk. 1611. Salk. 127.

Of Acceptance for the honor of the drawer—

If the Drawee refuses to accept the Bill any indifferent person may accept for the honor of the drawer. This accepter is bound to pay the indorsee or holder, by putting his name upon the back of it, as much as the Drawee would have been had he accepted it. There is no instance at Com. Law of one man's undertaking for another in this manner.

Not only an actual acceptance but any agreement to accept is consid^d^ an acceptance where a Credit has been given. 3 Burrow 1663.

Where an agreement has been made to accept Bills, altho' the drawee should after such agreement refuse to accept, yet Bills drawn after the refusal would be good against him.

An acceptance may be binding tho' not according to the terms of the Bill as for a less sum than the Bill or for a longer time 2 Wilson 9. Str. 618. / as if drawn for 4000£ & it is accepted as to 1000£ &c

Almost any intimation is considered an acceptance. If the person upon whom the Bill is drawn will undertake to write upon it, no matter what the writing is, unless an absolute refusal it is consid.d as accepted by him. "presented" & 'seen' written on the back of the Bill have been decided as a suffic.t acceptance.

Of the Manner of Negotiating a Bill

When to the 'Bearer' the Bill is made negotiable by delivery. If to "one or order' It must be indorsed either at length or leaving Blank. If it is left blank it then becomes negotiable by delivery & may be filled up by any subsequent holder. If the indorsem.t was at length the first indorsee must make another endorsem.t either at length or by blank &c. Doug. 611. 633. Such indorsem.t may be made at any time before or after the time of payment of the Bill 2 Ra. 575 3 Burr. 1516.

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Suppose the endorsement made upon a Blank note before the sums are filled up, the indorsor is liable for such sum as be inserted — Doug. 496. — If the acceptor of a Bill should fail & the endorsement was left blank — the last holder could not sue any intermediate holder but he might bring his action at Com. Law against the person of whom he received the Bill. — The suit may be brot for money had & received not upon the Bill without filling up the Blank — it may be filled at the Bar. If a Bill had been endorsed regularly by every holder the last holder might recover from any intermediate indorsor holder. Salk 128.

The holder of the Bill may fill the Blank with an order to pay him, or with a power of attorney to collect it — or if paid with a receipt — In the first case the action should be brot in the name of the holder, in the second ~~by~~ in the name of the indorser. Salk 128. 2 Raymd 871.

If the acceptor when demanded by the holder burns up the Bill & refuses to pay its contents — in such case the action may be brot by the Payee & the holder is consid^d as his attorney & admitted to testify to the fact of its having been burnt &c

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It has formerly been a question whether the omission of "or order" in an endorsement destroys the negociability of a Bill of exchange. But it is now settled that ~~no such omission restrains the negociability~~ it does not — nothing will do this but express terms restrictive of its negociability — Str. 457. Burr. 1216. 1222. 1 Black 295. To show that Bills may be restrained See Burrow 1227. in which case the expression "to such a one for my use" was considered a sufficient restriction Doug. 616. 17-815. An infants endorsement is not binding upon him as a contract yet it serves as a link in the chain of endorsements to carry them on & make them all good as to the others who endorsed before or after him. —

We have seen that Bank notes, Drafts &c coming into the hands of a bona fide possessor altho' taken from a mala fide possessor, are good as to the bona fide possessor Burr. 452 — 1 Black. 485. The same rule applies to a Bill with a blank endorsement Doug. 611.

When 2 Merchts are in Partnership an endorsement by one is binding upon both — but where a Bill is drawn in favour of 2 persons not in

Partnership accepted an indorsement by one is not binding upon both In the Court of
Doug. 630 Kings Bench an indorsement by one was determined to be suffict but this judgment was reversed in the Exchequer Chamber

A Bill to a single woman after she marries the indorsement may be made by her husb.d Str. 576.

A Bill indorsed by an Ex.or or Adm.r is binding upon them personally Str. 1260 1 Salk. 128. & if a Payee becomes a Bankrupt his assignees may indorse & bind themselves in the same manner

When a Bill is payable to one or order for the use of another, the Payee is alone known in the negociation of it Carth. 5. There can be no indorsement of a part of a Bill for were this the case the acceptor & Drawer might be liable to several actions for the same Bill &c. &c. Carth. 466.

Engagements of the Parties

When a Drawer draws a Bill he impliedly contracts with the Payee 1.st That the Drawee is a person capable of binding himself by acceptance. 2.nd That he is to

be found as described 3rd That he will accept 4th That he will pay it On the failure of the drawee in any of these particulars the drawer is liable to the payee or indorsee for the contents of the Bill & as it may be for damages & costs

A Bill may be good where a man only writes his name blank, if it can be proved that he gave authority to have it filled as a Bill Hen. Bl. 313.

A Bill is drawn payable at a future time, the payee presents it for acceptance before the time limited & the drawee refuses the moment of the refusal the drawer becomes liable Doug. 55. for it was a debt as soon as the Bill was drawn with the condition of his calling upon the drawee This evidenced by the case of Bankruptcy. Str. 919.

Engagemt of the Indorsor

Every indorsemt is in the nature of a new Bill & nothing but a paymt of the mony can discharge the indorsor The indorsor enters into the same implied contract with the indorsee as we have seen the drawer does with the payee The Holder by giving the

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drawer & recovering judgt is not prevented from bringing his action against any indorsor till he is able to recover his whole & he may pursue his remedies against all the indorsors & the drawer at the same time. It is a principle of Com. Law that where a man has 2 distinct remedies, both shall not be taken but by pursuing one he relinquishes the other — This principle has been urged against suffering the holder of a Bill to take so many remedies this objection however is easily obviated by remarking that the holder has his remedies upon several distinct contracts & not upon the same contract But at Com. Law there are exceptions to the above maxim as in case of Mortgages &c

If the Holder sues one indorsor, imprisons him & lets him at liberty, or if he escapes, the Holder has his remedy against any other indorsor 2 Bl. 1235

The Holder's Duty

The Holder in order to be entitled to a recovery must, 1st present the Bill for acceptance at or before the time limited

if any time was fixed & if "on sight" within a reasonable time. 2nd If he presents & paym^t is refused he must give notice to all persons concerned if he would lay a foundation for a recovery against them. If he does not & any loss is sustained by the failure of any person concerned, the loss falls upon the Holder

If after acceptance the drawee refuses to pay, notice must be given to the Drawer, if not any loss that may happen by Bankruptcy &c of the Drawee, will fall upon the Holder. The indorsors also must all have notice so that if the drawer fails the Holder may come upon them. Burr. 2670. 3 Dumf^s 712. Suppose the acceptance is variant from the tenor of the Bill, notice must also be given of this.

These Cases go upon the Drawee's being indebted to the drawer & the latter ought to have notice that he may recover out of the Drawee &c

But there may be cases where notice is not necessary to the drawer as where the drawee has not the effects of the drawee in his hands & is not indebted to him Dumf^s 410 The presumption is that he has effects of the drawer in his hands but if it is in proof to the contrary then notice was not necessary to have been given.

Law Merch.t

3rd Whether accepted or not yet at the time limited for payment it must be again presented & if the Bill is not paid notice must be given as before. If the drawer has become insolvent or has absconded notice must be given of these facts. It is not suffict that the drawer knows of the insolvency & the notice must come from the Holder so that the drawer may know if the Holder depend upon him for the payment 1 Dunn.p 170. This notice must be given in a reasonable time as to Foreign Bills it is settled that notice must be sent by the first post. With respect to Inland Bills it is impossible to lay down any rule. Doug. 315. Dunn.p 171. 167.

There has been a case where a Bill was not presented till after the reasonable time had run out & the indorsor promised to pay the Bill, but as he was ignorant of the Law, the promise was not binding.

Lecture 39. March 17th 94.

The Indorsor must have notice tho the drawer had no effects of the Drawer 2 Dunn.p 711. A Stat. in Eng. has fixed Inland Bills nearly upon the same footing with Foreign. In Com. we have no such Stat. and are governed by the Com. Law & Merch.t as it stood in Eng. before the Statute.

There is no particular form of notice for Inland Bills & the effect of notice for Inland is different from the effect of notice for Foreign Bills. If the Holder does not pursue the Stat. method of giving notice he cannot recover damages, Costs &c but may still have the same remedy he had before the Stat. was enacted. An Inland Bill is similar to an Order & differs only in one respect. As to an order the remedy must first be pursued against the drawee before the Drawer &c.

Of Foreign Bills as to the notice given &c

By the old authorities other notice than by ~~Protest~~ would entitle to a recovery but the Law is now established that the notice must be by Protest.

Of Notice by Protest

The Holder of the Bill presents it to drawee & if he refuses to accept, the Holder gives notice to the Notary Public & the Nota. Pub. presents it again to the drawee for acceptance & on refusal draws up a Protest which is a declaration of the facts &c & minutes down the time & all the circumstances, that the Holder intends to recover of the Drawer or the Indorser Damages &c. This Protest must be sent by the next Post. The Holder yet holds the Bill, that he may present it again at the

time of payment & if the drawee then pays all is well but if he refuse another protest is sent by the next post by the Holder & the Bill is sent with it. Lex Merc. 160. And if the drawee accepts the Bill variant from the tenor of it the same ceremonies of protest must made. If the drawee accepts & is like to be a Bankrupt a protest may be made to the Drawer for better security. 1 Salk Raym 3743. Or if the Drawee cannot be found a protest is necessary &c.
This protest is to subject the Drawer or indorsor as the case may be to the payment of the damages interest & costs. As to the Damages the Payee has sustained by non payment no general rule can be laid down. no proof is admissible to show that the Holder, if he had received the money at the day of payment might have made great profits by it. In different places different rules obtain. In Eng they have some rule respecting E. India & Americ. Bills.

By Costs is not meant costs of suit but the expences the Holder has been at in employing the Notary Pub. &c. Lex Merc. 161.

As to Interest the Gen. Com. Law rule obtains that interest is to be recovered up to the day in which judgment is rendered. This principle ap

plies to Notes & other contracts upon interest 2 Bur. 1086. If however there was any other instrument given in security of the interest, then interest on the Note &c is only recoverable to the time of signing the Writ – but the instrt mentioned may be resorted to for the other part of interest.

Of Supra Protest

There are several modes of accepting by supra protest 1st Where the drawer desires the Bill to be accepted on the account of a third person, he may accept for the honor of the drawer Lex Mer. 356. 2nd Or if a Bill comes indorsed the Drawee may accept for the honor of the indorsor in these it must be protested & notice sent to drawer or indorsor as the case may be. 3rd A third person may accept in like manner for the honor of the drawer or indorsor –

Of the effect of such acceptance as to the liability of the accepter for the honor of the drawer.

He is holden to all the indorsors & if for the honor of a particular indorsor to all the subsequent indorsees – If for the honor of the drawer the accepter has his remedy only against the drawer – & if for the honor of a particular indorsor he has his remedy against him & all prior

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indorsors & the drawer. Lex Merc. 457.8.9.

When a Bill is accepted it is prima facie evidence that the acceptor has effects of the drawer in his hands & if after acceptance he does not pay the drawer may maintain his action on the Bill against the ~~Drawee~~ Acceptor. 1 Wils 185. If the Acceptor have no effects of the drawer no action lies by the drawer, but the drawee may sue the drawer Doug. 249.

The acceptor may be discharged by the express declaration of the holder or there may be transactions that prove an implied discharge, but no indulgence or attempt to recover out of the drawer amounts to a discharge Doug. 236 7 8. A Letter from the holder to the acceptor "that he need give himself no farther trouble, for he (the holder) should look to the drawer" has been consid a release. A recovery of part of the money of the drawer or Indorsor, or taking a new engagement from them, is no discharge of the acceptor Doug. 237. in the notes). If the holder receives part of the money from the acceptor without giving notice to the Drawer & indorsors, it is a discharge of them for this is giving full credit to the acceptor. But if notice is given, it will not operate as a discharge. A Receipt

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however, of a part from the Indorsor is no discharge of a prior Indorsor or drawer 2 Raym.d 744. 1 Str 745. 1 Wills. 262.

It has been a question whether the Holder is obliged first to resort to the Drawer. The former authorities are in the Affirmative but the later shew that it is necessary to pursue the remedy first against the Drawer but against any Indorsor Salk. 1 Str 447. 2.d Raym.d 743. 2 Burr. 669.

The acceptor, for the honor of the drawer, must give notice to the drawer that he has accepted &c if the Drawer approve of his acceptance he need not present the Bill to the drawee - if however, the acceptor hears nothing from the Drawer he must present it to the drawee at the day of paym.t &c

Lecture 40.th March 18.th 94 -

Of the Remedies of the parties & what Evidence is admissible &c

It has been a great Question Whether an action of indeb. Assump. will lie against the drawee, Drawer & indorsor? It is now settled that where there is a privity of contract (as there is between the drawer & payee, & the Holder & indorsor) an indebitatus assumpsit will lie.

Formerly in the Declaration it was necessary

to particularize the custom, but since it has become the general law of the land, it is only necessary to state that the contract was according to the custom of Merch^ts generally. It must be alleged in the declaration that such an one drew the Bill, directed it to the drawee requesting payment and delivered it to the payee, and that the acceptor accepted the Bill. The indorsee in his action against the acceptor must state such indorsement as will give him a title. That the Bill was payable "to such an one or order" & that he comes within this description. If the 1st indorsement was given blank, the last indorsee might strike out all the intermediate indorsements & declare himself indorsee of the payee, but if the payee indorsed in full & all the intervening indorsements are on the Bill, he must state them all in his declaration. It has always been consid^d necessary to state that the drawer delivered the Bill to the payee and it has not been consid^d necessary to state a delivery from payee to indorsee in an action by the latter which would be necessary as in an action by the payee. This ap-

1st Action vs. Acceptor

Remedy against the Drawer

The payee must state that the drawer drew the Bill & delivered it to him, that he presented it to the drawee, that it was accepted & the manner of the notice it is necessary to state as by protest. After verdict it has formerly been consid.d good without mentioning the any notice but in Doug. 654 this doctrine is settled that a verdict does not cure a declaration in which notice was omitted.

There may be cases in which the drawee may bring his action against the drawer. This happens where a Bill was accepted upon the personal credit of the drawer & the drawee must prove that he had no property of the drawer in his hands. Exception has been made to a declaration by the drawee without stating a promise but the Cmp. Auth. all show that no promise need be stated 12 Mod. 538 Salk 128 Carth. 409. When a Bill passes by delivery as payable when to Bearer or by blank indorsement & is by such indorsee transferred without any indorsement, no action on the Bill is maintainable against the indorsee by the Holder, yet if the Bill is not paid an action to recover back the consideration given may be brot & such action may be met by

proving that due diligence to obtain paymt was not used, or that notice was not given &c This action must be brot against the man the indorsee received the Bill of but not against the intermediate Holders —

An action in other nations besides England are not brot on the Bill after protest but the protest is evidence of the debt. The following authorities show that all the remedies may be pursued by the Holder at the same time & point out the method of proceeding 2 Black. 714 2 Vern 115. 1 Wm. 515. Courts will stay the proceedings & prevent further if any person concerned as the Drawer, Drawee or any indorser will come into Court & tender the mony to the amount of the Bill & the costs on all the suits ~~up to the time of the tender~~ as far as they have advanced. Of Proving Handwritings &c

In an action by the payee against the acceptor the drawer's handwriting must be proved, but if the action was brot by an indorsee it would not be necessary. 1 Rayd 744. Str. 910.) But if the action is by the indorsee against the indorsor, the indorsor's hand is to be proved. If all the Holders indorsed their hands are to be proved.

In an action by the Indorsee against the Drawer the hands of both Drawer & Indorsor must be proved. He must show that he has used diligence to obtain Paymt of the Drawee — or other acceptor —

In the action by the Drawer against the acceptor, he must prove the acceptor's hand writing, his acceptance, demand again & refusal & his own payment of the Bill. But he need not state that the drawee had his effects for the Law presumes this & that belongs to the drawee to show to the contrary

If the suit is brot by the Drawee vs. the drawer, he must state the hand of the drawer & payment by himself & prove that he had not effects of the drawer in his hands 3 Wils. 18. A Bill is accepted for the honor of the drawer then there is no presumption that such acceptor has the effects of Drawer & there is no occasion to state this ~~in the action by the drawer against acceptor~~ If however the action is brot by the acceptor the drawer may prove the acceptor had effects &c & thus defeat a recovery. The protest is sufficient proof of the Bill's not being paid yet it is said that the Bill must be shewn by the custom of Eng.

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but it is not the general Law Merchant & it is apprehended that it cannot be done

The evidence of the hand writing may be by witnesses who saw him draw the Bill by his confession or by any circumstances of behaviour which cannot be accounted for without supposing he drew the Bill. Of a Defence

The drawer may set up forgery as a defence but this may not be proved by a comparison of hands for rogues ~~must~~ might draw a Bill in a very different hand from what they commonly wrote Mr. 1051. But where the proof comes from confession it must then be by the party to be charged as if an Indorsee sues the acceptor he must prove the indorsement of the Payee. The Payee's confession is not admissible.

If a defence is made that the consideration was illegal it is good between the original parties but by negotiation the turpitude of the original consideration is purged except in 2d Instances. A negotiated Bill in the hands of an innocent indorsee where the consideration was usurious or for money won at play in either case is void. In the 3d of Dunn 418 there is an important distinction made between a contract malum in se & mala prohibita.

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Lecture 41st March 19th 1791

Of Policies of Insurance

A Policy of Insurance is a contract between two men that upon one's paying the certain premium equivalent to the hazard the other will indemnify him against a certain event. The most usual Policies are upon Vessels engaged in Commerce. There are commonly Offices set up on purpose to insure. But insurances are frequently made by a number of Merchts unconnected with each other & there are called underwriters & each underwriter insures for what sum he pleases. These contracts are never usurious on the ground of the hazard. Insurances are sometimes made for other things than Vessels as Lives &c But this practice is forbidden by the Stat. of George 3rd in all cases only where the insured has some interest in the life upon which the insurance is made. Unless such interest exists the insurance is considered since the Stat. of George as a mere wager

At Com. Law wagers & also such insurances were lawful - & in this country the legality of such insurance depends altogether upon the Com. Law of Eng. But notwithstanding this practice was allowed of in Eng. for a long time & is now considd the Com. Law of the land, yet it militates against the first principles of Com. Law to which all adjudications ought to be subordinate - If therefore such a case should come up before our Courts, it is apprehended that they might with safety declare the insurance void by recurring back to the original principles of Com. Law That all practices which are against sound policy & dangerous to the [redacted] interests of community ought by all means to be discouraged -

Insurances are also made against fire - This is not strictly a mercantile transaction, nor is it governed altogether by the principles of the Law Merch.t The Com. Law is that the party insured must have some interest at the time of insu-

rance & also at the time of the accident & any alienation of this interest previous to the accident is a complete discharge of the insurance 2 Atk 551. The policy therefore is not assignable — In all these Policies the insurer is to be liable if burnt by the invasion of enemies, or any usurped power, or by any accident A mob has been determined not to be that usurped power 2 Wils. 363.

Forts Magazines &c & other Public property cannot be insured for the reasons why see 3 Burr. 1905. A Policy of insurance it is said may be explained by a Parol agreemᵗ 1 Salk 444 5

Where a Ship is insured "at & from" a place a question has arisen whether the insurer is liable if she is lost in the harbour before setting sail? It is decided that he is liable unless that voyage has been laid aside 2 Atk. 350. The liability begins at the time of insurance & lasts as long as the voyage is contemplated. If an Insurance is for "Ship & Cargo" & the Ship is lost in port before the Cargo is on board, the Insurer is not liable for the freight which would have been acquired 1 Burr. 251.

Loss Merch.t

Wagering Policies by persons uninterested are void by Stat. If however a man has lent money on Bottomry bond he may get it insured, but it must be so specified in the Policy. 3 Burr. 1394.

Where a Vessel is lost or damaged the person insured may bring his action on the Policy for the whole loss or for a partial loss. If any thing is preserved & this salvage falls short of the freight it is a total loss Str. 1065. The insurer by making satisfaction to the Insurce puts himself in the insuree's place as to the Salvage & is entitled to the prizes taken 1 Ver. 98. If a Ship is captured & retaken & condemned to be sold & a moiety paid to the recaptors the insured may recover as for a total loss, upon relinquishing the Salvage 3.d Atk. 195. There are no instances of a partial loss where the insured are obliged to abandon ~~on~~ left to them their election to take the Salvage or to abandon & resort to the Policy. A Vessel is taken & retaken before she is carried into port & sentenced to be restored to the owners it is a total loss 1 Wils. 281. A Merch.t Ship is

taken & retaken the insured may abandon & recover for a total loss before she arrives ~~into port~~ at the port of delivery, but after the insured can recover only for a partial loss 2 Bur 1198.

The least fraud vacates a policy — not only suggestio falsi, false affirmations, but suppressio veri any concealment of fact &c. 1183. As where the owner heard that the vessel was leaky & concealed this from the insurer. Or an agreem.t with the first underwriter that he shall not be bound if the vessel is lost & he is persuaded to insure by the owner to join in the insurance in order to make others willing &c 3 Bur 1361. But a concealment of a mans own speculation is not consid.d fraud. 3 Bur. 1905. Where the policy is fraudulent the premium must be given back to the owner & the policy to the insurer. If the Ship is lost thro' the fault of the Owner, Master, Pilot or Sailors the policy is discharged. If she is lost before the insurance was made, to render the insurer liable the policy must be expressed 'lost or not lost' & any deviation from the course unless compulsory discharges a policy, but a clear intention

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to deviate, if the Vessel is lost before she arrives at the deviating point, will not discharge the insurer. 12 & 13th of Strange.

The Insurer is not liable for things stolen. If Thieves are insured against, they must be public thieves.

Where the Cargo & Ship are insured generally without any certain value the underwriters are all liable if more is subscribed than value pro rata. But if the policy ascertains the value, the underwriters who subscribed after enough had been subscribed are not liable & must return the premium.

Lecture 12th March 20th 1794

A Double insurance is unlawful, unless where the insurers become Bankrupts & are incapable of paying. Or it may be Or two insurances on the same vessel may be made without intention as where the owner's factor in another country has the Vessel insured not knowing that the owner had done it himself. In this case both are liable 1st Bun. 489.

If in the Policy it is provided that the Vessel depart with a convoy & this is not done the insurer is discharged 1st Mod. 60. The Convoy in this case must attend the whole voyage Salk. 443. Altho the Departure is

without a Convoy, yet if it is taken at the usual place it is sufficient Str 1265.

If the Convoy separate unnecessarily as to take prizes the Policy is discharged but if the Separation is from necessity as by reason of a tempest &c it is no discharge.

In the terms of the Policy it is generally expressed "till the Ship is discharged from the voyage. When the Ship arrives if the goods are taken out by the owner in a boat not belonging to the Ship the Insurer is not liable for the loss, but if they are carried in the Ship's boat the ~~Insurer is not~~ Insurer is liable ~~Stran.~~ 1236.

The Gen. rule that a Capture enables the insured to abandon, but not if the capture was only a small hindrance as when they escaped suddenly or gave but a small ransom. 2 Bro. 683.

Tho an insurance against the perils of the sea, thieves &c does not subject the insurer where the vessel is lost or injury is done thro' the mismanagement of the Master, yet when the insurance is against the Carretry of the Master as where he runs away with the Ship, squanders the property, embezzles it, or deviates from the voyage without order of

When the Law of Nations
the owners - but mere negligence is not barretry A compulsory deviation by the sailors from the course of the voyage is not barretry Str. 1264.

If the insurance be against embargoes or restraints of Princes &c it does not extend to Seizure for disobedience of the Law as for running goods &c

Where the risk is not run the premium must be returned but if the risk has once begun to run the premium is not to be returned - Sometimes however a part of the premium must be returned where 2 premiums are given upon the same contract and the risk is run upon one part & not upon the other - If an underwriter insures a vessel which he knows has returned the premium must be delivered up

4 years unheard of in the longest voyages is sufficient evidence that the vessel is lost & then the insured is entitled to recover. But if afterwards the Ship arrives the Insurer may recover back the money paid

Of Contract by Charter Party

Where a Vessel is hired to carry ~~goods~~ articles of Merchandize the contract is called Charter Party & the reward for the carriage is called the freight - A vessel is hired for

so much a month — for a whole voyage — for so much for the outward — or for the inward voyage — If the Ship is lost the freight is lost — The owner looses his Vessel & freight, & the Freighter his goods — But where the contract is a certain Sum for the outward & a certain Sum for the inward voyage & the Ship performs the outward & is lost in the inward, the freight on the outward must be paid for if no contract is made respecting the freight it becomes due at the port of delivery — but if by the terms of the contract no freight is to be paid until the return of the Ship & she is lost on her return the ~~ought~~ outward & inward freight are both lost — If the Master return without lading, yet he shall be paid where it was owing to the Merch^t or his factor that she returned empty —

The Master has a lien on the goods for the freight — If the Ship is not lost but the goods are damaged & the owner chooses to take them he must pay the freight — He is however at liberty to abandon the goods & recover their value. If he takes any part of the goods he must take all — He cannot separate the undam-

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undamaged from the damaged If he a
bandons the goods becomes the Master's

If the Ship is disabled when part of the
voyage is performed the Master shall have
freight pro rata in proportion The Master has power
to borrow money & hypothecate the Ship
& the tender has the Ship for security
& the owner & Master are personally liable
for the money. The master takes up money
for the refitting or victualling a Ship the own
ner is liable altho the Ship was leased
to the Master. The owners are liable for loss
occasioned by the Master's misconduct &
the Master is again liable to the owners -
& it is said in some Books that the Master
loses his wages, but it is apprehended
this is not the case any further than
to answer damages - Car. 58. Salk 440
3 Mod. 322. Bac. 592.

Lect 43rd March 2d 1794.

Of Merchant & Factor

A Factor is a man employed to trans-
by a Merch^t to transact his business
for which he is paid according to the nature
of the contract - He takes a Commission &
if the Commission empower him to sell

deal with the goods as his own he may sell them on credit. And if the pay cannot be recovered for the goods when sold the loss is the Merchts. If the Commission be to sell & dispose generally, the Factor has no authority to sell on credit even if they are bona perilina The Factor must account for the goods he receives according to the nature of the Commission & for this purpose an action of account is the only Legal remedy but this action is now dispensed with and an application in Chancery substituted as being more convenient If the Goods were lost or stolen it is a complete defence to the Factor He has a lien on the goods he also has his remedy against the Mercht The lien upon the goods in his hand is good against Creditors In this respect the Factor is not consid as a Bailee at all events

In this State we have not ordinarily applied to chancery to call the Factor to account but have avoided that by other actions which are concurrent with account as indebitatus Assum. &c

If a Factor undertake to ensure goods & they are seized he must account for them

& the seizure is no defense — If a Foreign factor run good not seized, he is allowed the duties in accounting in a suit in Equity — but if done by a home factor he is not allowed the duties for this would be entailing their own revenue —

It is a question whether the principal shall be liable for the fraud of his factor civiliter By the current of authorities he shall be liable for all the damage done by the factor & there appears but one authority to oppose the idea Cro. Jac. 469. If a Factor sells the goods of his Merchts & purchases other goods with the money & dies, the goods purchased are the Merchts — & not subject to the creditors of the Factor — but if the goods had not been purchased the same money would have been liable to the Factors debts Salk. 160.

If a Factor sell goods on credit without any authority, yet the sale bind the Merchts for the transaction as to the vendee was bona fide & the Master in such case must look to the Factor — but if these goods were pledged by the Factor to secure his own debt the pawnee can not retain the goods in defiance of the Master

Hil. 1778.

Law Merch.t

When the Factor undertakes to sell goods on credit, the Vendee becomes debtor to the Merch.t & not the Factor but a paym.t to Factor is good, unless by the express prohibition of the Mast.r to the Vendee to pay the Factor. In some places there is a custom that a Factor when he sells goods shall run all the risk of loss & in such case he may sell on credit.

There has been a Question Whether the Vendee is debtor to the Merch.t or Factor & whether the Vendee is liable to the Merch.t after being forbidden to pay the Factor. Str 1182. This is unsettled. The case in Strange is a determination of the Jury contrary to the opinion of the Court. This was a jury of Merch.ts.

Of Mariners

If the Mariners do any damage by embezzling the property freighted the Master & owners are liable for the loss sustained. There is a rule that if the Ship is lost by Storm or taken by Pirates the Mariners shall have no wages. Also if they run away 2 Ray 398. 650. 206. The Law has made particular provision for mariners to obtain their wages. They may all sue in a Court of Admiralty

Law Mercht

Vent 146 Y join in one action & this notwithstanding
2 Ray: 1206 they themselves by a written contract
on land They have a remedy against both
Master & Owner The Master however cannot
2 Ray: 576 cannot sue for his wages in a Court of Ad
miralty where the contract was made on
shore nor if he dies on the voyage can his
representatives.

Bacon Abr. Tit. If part of the Property is thrown
overboard to save the rest, the Master owners
Freighters & Passengers must all contribute
according the Property they respectively have
on board & if the goods are injured in light
ening the Vessel &c an average is made & if
any Property is given to Pirates by compo
sition to save the rest, an average is also to
be made but if the Pirates took the goods
by force there is no average every one runs
his risk.

When a Vessel is taken the Master
may ransom her at the expence of the ow
ners or if unable to pay the ransom he
may pledge himself or any of the Seamen
& the owners must redeem them.

If by the cast the whole Property is preserved all the Owners of the Property shall contribute to the average according to the Property they have in the vessel

Rights of Merch.ts to stop goods sold in transitu

The Consignor may stop goods sold in transitu before they arrive at the hands of the consignee if the Consignee be insolvent But if the Consignee assign the Bills of lading to a third person for a valuable consideration the consignor has no remedy against the such assignee This principle of the Law Merch.t is variant from the Com. Law for by the latter if the goods are once sold they cannot be taken but by attachment 2nd Durn. 863.

Of Owners

Where there are a number of owners the majority in property are to regulate. If therefore the Major part agree to send her to Sea & the minority are against sending her upon the majority giving security in Admiralty to secure the shares of the minority the Ship may sail & the minority have no share in the profits but if she is sent with.t giving this security the minority shall share in the profits for had she been lost they would have borne their share. The minority cannot ~~lett~~ send the Vessel with.t consent of majority but may

compel a Sale of the Vessel This can also be done when part of the owners are unable to fit her out &c

If the Master take goods to carry for hire & he is robbed in port under the dominion of the Com. Law, he is consid as a Common Carrier & liable at all events but if on the Sea, the Mercantile Law prevails & he is not liable Dent 190. 238 2 Raym. 918.

Miscellaneous Principles

Lecture 11th March 22nd 1794

1. Cohabitation & reputation of Marriage is good proof in all cases except in an action of criminal conversation Doug. 166.

2nd. For money mispaid to an agent an action of money rec'd & rec'd is brot but evidence that the agent paid it over is suffict to shelter the Dft from the Plf's claim Coup. 566

3d. An agent who paid money is a good witness that he paid it Coup 805. This a notorious exception from to the general rules for admission of testimony.

4th Husb'd & wife are not witnesses for or against each other upon a ground distinct from interest. 2 Dunnf 208.

5. There is an authority in the 2d Dunnf 758 which serves to elucidate the Question Whether an unfair return of non est inventus by the Officer is conclusive against the Bail

6. When money has been paid upon an illegal consideration & an action brot to recover it back, the illegality of the consideration is not always sufficient evidence to prevent a recovery by the Plf. Doug. 153.

7. The declarations of a dying person good evid. Leach 308 & 399. 407.

Miscellaneous Principles

8. A Person who has no notion of eternity is no witness Leach 368.

9. Whoever purchases of a person & pays a full price against which person there is a judgment of which fact the purchasor is sensible the ~~contract~~ purchase is fraudulent & void Doug. 88.

10th There is a case in Cowp. 786. where a misrepresentation to the first underwriter tho there was none to the rest vacated the Policy as to all

11. That Foreign Laws must be proved as facts See Cowp. 174.

12. Where one of two innocent persons must suffer, it is a Rule that the person who enabled the 3d person to do the wrong must suffer The Case of Hern & Nantes & other similar Cases are manifestly an exception to this Rule —

13. In an action of trespass vi et armis against the Sheriff, Evidence that his Bailiff committed a wrong in the execution of his office is sufficient to maintain the action Doug. 12—

14. An action upon a Stat. for a Stat. trespass, evidence of a trespass at Com. Law will support the action but not warrant a judgment for the penalties of a Stat. 2 Black Rep. 900.

Miscellaneous Principles

15. It is an important & unsettled question whether a witness interested at the time an instrument was executed can afterwards be admitted by becoming disinterested Str. 1253. 1 Bur. 414.

16. Of the Necessity of calling the Subscribing Witness Doug. 206. 89.

17. How an execution against one of a company is to be levied Doug. 627.

18. Whether money is liable to an execution has been a question, but by our Stat. it is extremely clear that it is not for any thing taken by execution is to sold at the first day to do which with money would be ridiculous indeed (But it is the practice here for sheriffs to take money & apply it towards payment of Execn)

19. Usury

A gives B. a note with legal interest & sometime after gives B another note with a reservation of more than lawful interest. After this they agree to put both notes into one. Query. Does this latter transaction so swallow up the original fair contract as to render that void? In England this principle is settled in the case of Grey vs Fowler Sess. Black. 462 — Expin. 175 Although the last note would be clearly void, yet as the original 1st contract was legal, it would be unreasonable & in violation of principle that such a contract which was pure when made should be rendered void merely because it happened to fall into bad company.

~~Perhaps~~ ~~that~~ ~~may~~ ~~make~~ a difference in ~~this~~ ~~Country~~ as it says "all bonds, ~~Contracts~~ ~~mortgages~~ & ~~assurances~~ ~~&c~~ are and ~~are~~ ~~declared~~ ~~that~~ ~~State~~ of ~~Assurances~~ "all bonds" & assurances wherein ~~shall~~ ~~be~~ reserved more than 5£ ~~in~~ speak the real ~~&~~ ~~bearing~~ ~~not~~ ~~the~~ ~~usual~~ ~~contracts~~

It is an established principle that no acts of the parties shall destroy a contract originally good. A distinction is made in the case of Robinson & Bland 2 Burrn. 1077 by Justice Denison between the security & the contract Vir. "If part of a Contract arises upon a good consideration & part upon a bad one, it is divisible but otherwise as to the security for that being entire is bad as to the whole"

A party may justify under erroneous proceedings till reversed but not under irregular proceedings for they are null & void"

In Engd from the delivery of the writ to the Sheriff ~~where an action is commenced against~~ the property of what person debt to account of the debt is considered by statute as divested from the Dft to the Plf. Therefore an executor de son tort must deliver over the goods to the rightful admr before ~~action brought~~ against him or he is chargeable & otherwise in this country for the property ~~is~~ not vested so divested

Of Real Property

Began May 26th 1794

Lecture 1st

Notwithstanding it appears extremely easy at first view to define Real Property, yet it is impossible, in any one proposition, to give the Student an adequate idea of it. It may be told that Real P. is "Corporeal & incorporeal tenements" But this gives as imperfect an idea of the subject, as "Aristotle's definition of a Man" that he was a featherless, twilegged animal"

The Subjects of Real Property are of 2 kinds — 1st Lands or Corporeal Tenements & 2nd Incorporeal Tenements — These two general divisions include all Real Property. Under Land is included all the property which adheres to the ground, as well above as below the surface — usque ad calum et ad inferos — Houses, Water, Trees, Mines, Artificial Emblements &c &c are Real Property & will pass with a conveyance of the Land.

Incorporeal Tenements are intangible, ideal creatures. As a right of way, a right to a stream or in Eng. Offices. Land may be conveyed, Houses &c may be excepted. In such case it is M. Reeve's opinion the house becomes personal prop.ty tho this is unsettled by any determination of Courts. The ultimate fee of the land which the house covers is in the owner of the surrounding land, but as long as the House stands the ground under it belongs to the owner of the house.

When Trees are excepted they are always consid.d personal prop.ty and are governed by all the rules relating to personal property. Authorities differ concerning what would be the operation of a grant of timber trees. The general & better opinion is that they are personal prop.ty being contemplated as severed from the freehold.

Emblements pass in a conveyance of land. They are consid.d Real property for the sake of being conveyed with the land. In every other point of view they are personal property & also to favor criminals that it need not be felony to steal them. In every other view they are personal prop.ty.

The only Estates which a man has in Real Property are 1st An Estate in Fee simple 2. An Estate in fee-tail & 3. An Estate for life. In both kinds of real property a man may have a personal property As an Estate for years in Land — or an Estate for years in an incorporeal tenement —

A man cannot so conduct with personal as to cause it to be governed by the rules of real property — neither with the latter so that it be governed by the rules of the former — Real Property, once find out what it is, invariably descends to the heir & Pers[l] to the Executor so that it is a matter of no inconsiderable impotance to know what is Real, & what Personal —

Whoever has an Estate in Feesimple or Feetail always has an Estate in Real property — not so with an Estate for life — This estate may be created in personal prop[y]. as the ~~sure~~ of a Library of Books &c —

It was long unsettled in Eng. what became of an estate for life per auter vie when the donee died first — Sometimes it was considered as open to the first occupant — But [illegible] it was determined

No such estate has been ever made of Chattels

to belong to the Executor - It is a matter of uncertainty what would become of fu[illegible] an estate in Con. the Stat. of Car. having no operation in this State -

Lecture 2nd May 27th 1794 ——

Of an Estate in Fee simple

A fee simple is such an estate that when given, it is wholly at the disposal of the person named as grantee - He may dispose of it at his pleasure either by deed to operate in his life time or by devise to operate after his death - & if not disposed of descends to his heirs general - It is created by these terms "his heirs forever" - These words are by the English Law indispensible for a fee estate to pass by deed - Co. Lit. 1.

In a will a variety of other expressions will pass a fee simple - ~~(But the same technical expressions in both deed & devise are not absolutely requisite)~~

Formerly an Estate in fee simple was held under a Superior at will - ~~When~~ After the Feudal System had begun to shake a little the tenant acquired his Estate for a term of years - after the vigor of this disgraceful system had in some measure abated tenants acquired their estates for life - This estate passed

by the terms "to him forever". But in the progress of refinement the feudal tyranny vanished & holders of feuds were allowed to alienate their Estates. To do this they had no terms. An estate to a man forever was only an estate for life. Some other terms were therefore necessary to transfer that absolute property, which the Romans called allodial & which we call a fee simple. For this purpose the terms "to him & heirs forever" were invented. There terms give nothing to the heirs of the grantee. ~~as if~~ An estate "to A & B forever" would convey a joint estate. but an estate "to A & his heirs forever" conveys nothing to A's heirs it being only a technical phraze ~~to vest an absolute Estate in the grantee~~ designate the quantity of the Estate granted viz a fee simple. See Plowd. Brett & Rigden. It would be difficult to support the reason why this phraze should be absolutely necessary, when the idea is expressed ever so clearly in any other words would not pass the fee. It is probable that this absurd notion may yet be rejected by Courts when they have shaken off their degrading servility to precedents.

Wherever such an estate is conveyed by the terms "to him & his heirs" forever any attempts by which the grantor may endeavor to clog the estate in derogation of the quality of fee simp-

would be vain — As that the Grantee should not alien or devise such estate &c — for a fee simple was created & this is an inherent quality of such Estate that it may be alienedd by the grantee. So a deed "to A & his heirs forever" remainder "to B & his heirs", the remainder in this case is wholly void for by the legal intrazo the whole estate was conveyed to A. liable to descend to his heirs. Vaughan 269. Cro. Jac. 591. The passing of a fee simple in a Will may depend upon a contingency to a person in remainder & might in a deed (in Esp.) were it not for the maxim that an estate cannot commence in futuro. A fee simple must descend to the heirs general & cannot be otherwise given — An Estate "to A & his heirs forever on the part of his mother" This clear intention of the grantor could not be carried into effect, it being against the rules of Law Co. Lit. 130.

A fee simple may be created in a will by other words than "to him & his heirs forever". The rules respecting Wills were established at a much later period than more liberal those respecting deeds, which accounts for this difference — Mr Reeve supposes any words will do which prove that it was the inten-

tion of the Testator to pass a fee simple.

The rule is that the intention of the testator is always to be complied with provided such intention is consistent with the rules of Law. It is important to understand this maxim perfectly. Is it not a rule of law that the words "heirs forever" are necessary to create a fee simple? And that long before real property could be devised? altho the intention is clear yet is it not in opposition to a known rule of law? The answer is This rule is not applicable to the construction of any words whatever, but only to the nature of the estate conveyed - for instance the Law says that a fee simple must be wholly in the power of the owner to dispose of. Let the intention of the Testator be as it may, he cannot alter this quality by any restriction. So personal estate goes to the Exr & cannot by a will be made descendible to heirs. So also personal prop^ty cannot be entailed no intention can alter the Law - All such cases ~~which are out of the~~ & whatever is out of the power of the testator to do, let him use what expressions he will, no intention shall make effectual. But where the thing intended to be done is in his power to do, in such case the intention

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governs altho the proper technical expressions are not used — See case of Ambrose vs Hodgson. Doug.

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The instances which have been determined to carry with them sufficient evidence of intention to pass a fee are — A devise in fee simple — A devise to a person to pay the devisors debts or the debts of any person, for it implies a power to sell to effectuate the devisors intention — A devise to B, in these words "I give my farm at C, to B upon his paying 100£ to D — Had the devise been payable out of the annual profits, this would not furnish such evidence of intention — "All my estate" passes a fee simple — But if words of locality are connected with the terms "all my estate" as all my estate at such a place, there is a difference of opinion in the Books — The current of authorities are however in favor of passing a fee simple — "My estate forever" passes a

(The same but the 100£ was made payable out of the annual profits)

(the words)

2 Wms 5	4.	Coup.	306.
2. Vesy. 614.	12 Mumf. 112.		229.
2 Lev. 791.	2 — 653.	1 B.C.	432
2 Atk. 38.	3 Wils. 413.	Doug.	730.
	514		

The terms "all my effects real & personal" have been decided to pass a fee & also "all I am worth." "All my estate in the occupation of such a person" held not to pass a fee in Doug. 730

Of the maxim Nemo est hæres viventis.

An estate given to the heirs of B conveys no estate to the heirs, if B is living for according to the maxim no one can be an heir to a living person. The estate therefore is given to nobody, as B has no heir. But if it is apparent that the Testator meant to point out any particular person by the term "heirs" then he may take. As to the heir of B. If B had an only son, it is presumed the Testator meant the heir apparent. Som. Bay. 330. In every case of a devise to the heirs of a person being alive, is not the presumption natural that the Testator meant the heirs apparent? The propriety of the Law, therefore, may be questioned.

Of Estates in Tail.

The technical terms to convey an Estate tail are "to one & the heirs of his body." These are indispensible in a deed. In a Will

any expressions indicative of the Testators intention to pass a fee-tail, will answer the purpose. "To a man & his issue" are sufficient or "to one & his sons" he then having none.

Origin of Estates Tail

When estates began to be alienated, the pride of the nobility was wounded, & they trembled thro fear that their estates would be soon broken up by this practice. They longed for some regulation ~~by which~~ to prevent the alienation of Estates ~~& keep~~ that entire to their blood relatives their ~~estates~~ might descend forever thro ~~the posterity of their noble blood~~. For this purpose they contrived the conveyance in fee tail, thinking this would effectually answer the end for which it was invented. But the intention of the grantor was defeated by the construction of Courts. This gave rise to the famous Stat. de donis the object of which was to lock up estates in the blood of the nobility. This Stat. was the 13th of Edw.d 1st. ~~This Statute~~ It was completely evaded by the conveyance by Fine, & Common Recovery. The com. Recovery was in short this. A. wishing to put his estate in a situation to alienate it, agrees with B. to sue him for the land & not to ap-

pear to answer to the suit. B then has the estate & is to convey to A a fee-simple. In this way the entailment is docked.

Nature of an Estate Tail

An estate tail is divided into Tail general & Tail special. The former, is given "to a man & the heirs of his body" generally, without any restriction either in favor of the male or female line. The latter is restricted "to the heirs of his body by such a wife" or ~~"to his heirs female, or heirs male"~~. If it be to the heirs male, the one who takes must be not only male & heir, but must have derived his descent thro males only. otherwise the estate will revert back to the grantor or his heirs. for ins. an estate is given to a man & the heirs male of his body" he has a daughter, who dies leaving a son. This son cannot take his parent thro whom he must derive his descent from the donee in tail, not being a male. If it be to the heirs female. the person who takes must not only be heir & female but must derive her descent thro a line of females. See Cok. Lit. 25.

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Lect. 8th Mar 29.

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Of the Qualities of an estate tail

It is liable to revert back to the Grantor on the death of the donee in tail & failure of issue.

A tenant in tail is not answerable for waste the Reversioner's interest being on so doubtful a contingency that it is considered no thing in the eye of the Law.

His wife shall be endowed as in all estates of inheritance.

The husband is entitled to his curtesy in the estate tail of his wife.

An estate tail may be conveyed in fee simple & the conveyance is good as long as the tenant in tail lives.

Connecticut Entailment

It was long uncertain what would be the Law of Entailments in Con. Learned Lawyers ~~undertook~~ undertook to tell what it ought to be, long before any decision of Court. Some supposed that the old fee simple conditional, that prevailed previous to the Stat. "De donis", would be here revived. Others contended that the Stat de donis was our Law it being an ancient Stat. &c. At length however their suspense was relieved by a decision of the Sup-

erior Court. By this determination the first Donee in tail could not alienate so as to destroy the right of his heir and the estate descended to the heir, vesting in him a fee simple. The Power of the Court to make this alteration from the English Law was questioned, & to remove all doubts a Stat was made in 1784 which adopted the idea of the Sup. Ct. Our Entailmt differs from the English only in the duration of the Estate. Some have supposed it to be no more than a life estate. But this is not the case for the Legislature have made use of the term "entailment," & this sufficiently shows that they meant to adopt the English Law with the single exception of duration, which they determined should be no longer than the life of the first donee. All the incidents therefore of an estate tail in Eng. belong to our's with the exception mentioned.

Of a Tenant in tail after possibility of issue extinct.

This happens where one is tenant in special tail, & a person from whose body the issue was to spring, dies without issue. As where an estate is given A. & the heirs of

to be begotten on the body of his present wife & the wife dies without issue -

The duration of this estate is for life only yet the tenant is not liable for waste as other tenants for life are - & if he alienes in fee it is a forfeiture of the estate Lt. 28 Doct & Stud. t. 60.

Of an Estate for life

Of estates for life some are created by operation of law & some by the act of the parties - of the former kind are estates in Dower & Curtesy - Estates during widowhood, or while the donee remains clerk of a Court &c depend upon the act of the parties, liable to be determined at their pleasure -

If a lease is made without any time limited, it is a lease for the life of the lessee - but such a lease by a tent. in tail is for his own life for obvious reasons

A Tenant for life is punishable for waste & liable to forfeit his estate - He can not alienc in fee as a tenant in tail may for such alienation is a forfeiture to him in Reversion & the deed is void

It might be a question in Con. Whether this would be a forfeiture; as our circumstances are totally different from those which produced this practice in Eng. — Lords leased their estates to persons in whom they put confidence to assist them &c, & would not suffer stranger tenants to be palmed upon them Such tents may take necessary fire bote, House bote &c

Of a Tenant by Curtesy

To entitle a man to this estate his wife must have had issue born alive who would have inherited — In England there must have been an actual seisin on the part of the wife — But here entry is not necessary. A man may be as completely possessed without entry as with —

There was formerly a decision in our Courts That tenancy by curtesy lasts no longer than till the heir comes of age — Some say there have been contrary decisions, but M^r R. cannot satisfy himself as to this A Question might arise whether a curtesy estate is not governed by the Law of Gavelkind which was the tenure of Kent & the tenure

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of our lands under the Charter? as no Stat. has made a different provision — The curtesy in Gavelkind differs from the Com. Law Curtesy — That it is only of the moiety of the wife's Lands marriage alone without issue entitles to it & it determines on a second marriage.

Lecture 5th May 30th 1794

Of Estates in Dower under the Eng. Law

This happens where a husb. dies seized of lands. The wife may take the third part of all the lands & tenements of which the husb. was seized during coverture, to hold for her life — The estate must be such as might be inherited by her issue. It must therefore be a fee simple or fee tail. The wife is dowable in a seisin in Law as well as actual seisin for it is not in the wife's power to bring the husb. to the actual possession as the husb. can the wife's. The wife's title to dower is indefeasible as to its liability to creditors & tho the husb. may devise away from her all his personal property yet he cannot by devise, deprive her of her dower. She must not commit waste but what would be considered waste in other tenants would not be in a widow — an alienation by her in fee is a forfeiture — The heir must

Sets off her dower in 40 days after her husbd death If he refuses, she has her remedy at Law & pending the action, she may occupy the husbds mansion house — This estate is paramount to all claims of creditors during her life —

How Dower may be barred

1. By a divorce a vinculo matrimonii the being the guilty party
2. By her elopement with an Adulteress —
3. By jointure settled upon her before marriage — This was effected by a Stat. Hen. 8 — The jointure must be competent it must last during her life, & vest in her immediately on her husbds decease — If the jointure is determined by Chancery to be incompetent, she may resort to dower — When a jointure is made subsequent to marriage, she has her election to take up with that or resort to dower — This on the ground of her being under her husbd restraint after marriage

Difference between Eng. & Con. Law

In Con. the wife is to have only "one third of the estate of which the husbd dies possessed" Some Lawyers make a distinction between seizin & possession — others say they are synonomous terms — no case has yet come before a Court, tho several are about to — In England if the heir refuses to set off the dower, the widow has to

is driven to a law suit for redress. When this is the case, it is generally 2 or 3 years before she can recover her right. In Con. a great improvement is made in the Law of dower. Here the Ct. of Probate appoint 3 judicious free holders to set off the widow's third part & the same immediately into possession. The transactions of these men have been almost universally satisfactory but the heir if he thinks he is injured may appeal to the Sup. Ct.

A Divorce a vinc. mat. is not a bar except where the wife is the guilty party. A divorces a mens. et thor are no bar. Dower may be barred by jointure. By a fair construction of the Stat. jointure may be made in personal property but this would be attended with many difficulties for in this way a cruel husb might deprive his wife of every claim upon his property unless it could the personal jointure could be consid. her separate property as all her personal estate is vested in her husb on marriage. If a husb in sound health is disposed to deprive his wife of dower he may by aliening his lands &c. This is a misfortune to the woman for which she has no remedy. But if the alienation is in contemplation

of death, to deprive the wife of dower, it is consid^d a testamentary disposition, let the nature or terms of the contract be what they may. When property is given to child^n to defraud the wife, the shall stand in the place of creditors & take her dower —

If in any instrum^t an estate is conveyed to a man for life & in the same instrum^t, a fee simple to his heirs the fee simple vests in the first donee as "heirs" is the technical term for conveying a fee simple —

The English principle is That, in a will if any other expressions can be found plain ly indicative of the testators intention to pass only a life estate to the first donee & a fee simple to his heirs, yet it appears from the authorities that it is extremely difficult for judges to discover the intention where to a man of common sense it is clear as day light. When an estate is given to one for life & not otherwise, & the fee to his heirs, the Court made out to discover the intention & the estate passed accordingly — Also If in an instrum^t an estate for life is given to one & in the same instrum^t an estate tail to the

heirs of his body an estate tail is vested in the first donee &c &c

See the last case in the 4th of Burrow —

Lecture 6th May 31st 1791 —

Authorities for the above Subject

1 Rep. 93 - 66
Cro. Eliz - 313
2d Ray - 203
1 Vent - 231
Hodgson vs Ambrose Doug - 2 Atk. 247 / 2 Pr Wm 349 -
1 — 412
Pr Wm 142
Bagshaw vs Spencer in Vesey — 123
Long & Lemmy Burrow 612

No Estate of freehold or inheritance by the English Law can commence in futuro - A fee simple may be limited in remainder after a life estate & in this way commence in futuro - But this intervening estate must be a freehold & not an estate for years, unless livery of seisin is made of the whole estate & then the estate in remainder is said to commence in presenti, solvendum in futuro, so that the maxim is not disturbed —

By devise estates may commence in futuro without any intervening estate - such a devise is called executory - At how great a distance the devisee may be & take by such devise is not settled in the Eng. Law In Com. it is established by Stat. That no estate either by deed, or Will can commence at a greater distance than to a per

Son in esse, or to the immediate descendant of such person.

Of an Estate for Years

This is personal property. It is to commence at a certain period, & end at a certain period. This estate may commence in future. No livery of seizin necessary to pass it. Parol leases for 3 years are good but not for a longer period. ~~In Com. a parol lease is good only for one year~~ (no parol lease is good out of Com. a parol lease is ~~good only~~ confined by statute). Suppose a parol lease is made for a longer period than 3 years & the Lessor sues the Lessee at the end of the term on the former contract. he cannot recover on that ground. Altho' the Lessor cannot recover by force of the contract, yet he may on the ground of a promise raised by the justice of the Law that the Lessee should pay what is reasonable for the use & occupation of the land. The action is an indeb. Assumpsit. It may have the operation of a written lease, where the Lessee has paid rent. The Lessor shall not eject him on the principle that no man shall drive another out of possession where he is compellable in Chancery to make good the title which is the case in this instance. The tenant by parol lease forfeits by committing waste.

Real Property

Month Estates are considered in Law as year estates. Lunar months are meant. In Cowper 714 "From the date" & "from the day of the date" are the same & shall be consid. exclusive or inclusive as shall best answer the purposes of justice.

Estate at Will

This amounts to nothing more than a license for the tent. to go on the land & improve. It is liable to be determined at the will of either party. But the lessee shall suffer no inconvenience by a sudden order of the lessor to go off. The Lessee determines his estate by committing waste &c. any act of ownership exercised by the Lessor incompatible with the lessee's tenancy is an end of the estate.

Of an Estate at Sufferance

This is where a Lessee continues in possession after the lease is out. He becomes a trespasser as a tent at will.

Emblements

These are the annual, artificial produce of land. They go to the Ex^r. If the tenant has sowed the land before harvest the estate [illegible] & will take the

emblements, unless the term was certain & the tent knew it would end in this case it was his own folly to sow & he must loose them. — A woman has an estate during widowhood — if she has sown & before harvest marries she looses the crops but if she has ceased, her lessee shall not ~~be~~ be injured by her ~~folly~~ act. If tenants at Will or Sufferance forfeit their estates by their own act, they loose their emblements.

College 7th June 2d 93

New York

The Laws of England & New Y. are the same except the terms which create a fee simple only by a late Stat. any words which in Eng. will create an estate tail, will in N.Y. create a fee simple — So that entailments are, by one general stroke, ~~completely~~ cut up by the roots —

Estates per autre vie are in N.Y. personal prop & go to the Ex^r if not devised —

They have made an excellent provision to prevent widows from being defrauded of their Dower — The widow is not deprived of her Dower by the husbands attaint — Their Laws of entails is the same as the English —

Real Property

Of Incorporeal Tenements

The greatest part of these do not & never will exist in this country, but it may be entertaining to read them in Blackstone & ~~as a part of our~~

Those which do exist here ought to be understood

Of an Annuity

This may be granted to a man & his heirs forever — The Grantor does not bind his heirs by such a grant unless particular mention is made of this intention — But he binds himself & to the grantee, & his heirs, if they should happen to outlive the grantor — It is personal property as to the grantor as the duty dies with him & descends to nobody — But to the grantee it is real & will not descend to the Exr but to the heir —

~~But~~ The grantor may bind his heirs, but by this is not meant his heirs generally — The grant binds none unless they have received assets from the ancestor — It may be an Estate tail, for life or for years Litt. Sec. 114

Of Rents

We have properly no rents here — The purpose of them is answered by giving notes payable every year — The growing rent goes to the heir tho when collected it is easily seen it must be personal property — The heir owns the Reversion & the ~~incident is~~ rent is so incident to it that

a reservation of Rent to the Ex[r] was considered
nugatory in Bro. Elec 288 Where a lease is
made by a Lessee, the rent reserved is personal prop[y]
There is a practice in Eng of selling a fee simple
absolute & reserving rent, & this rent follows the
Reversion wherever it goes Elec 837 This may take place
here 5 Rep 11. Car. 2 Leach 253 Lit. 45-7
Arrears of Rent have nothing to do with the
Reversion being personal prop[y]. They go to the Ex[r]
Elec 575 Salk 578

Of a Right of way

These may be in fee simp. tail &c
In Eng. they are by Prescription There is no such
thing here But a man may here bind his heirs
& assigns ~~to grant~~ in a grant of a Right of way
& this gives a privilege which will descend forever
to the assignees &c A right of way to one for life
is not assignable
A man may grant away the use of a stream
passing thro his land — common sense is the
law to teach what is right in such cases &c
Lecture 8 — June 9 — 94

Of Mortgages Lecture 8th June 94

A Mortgage is a pledge of land in security for a debt. The Mortgage is not for the paym[t] of the debt, but merely a security liable to be redeemed on paym[t] of the debt. The personal security of the Mort-gor being deemed insufficient. The Mortgee is no objection to the Mort-gee's pursuing his remedy upon the debt for the security of which it is given, even at the same time that he is ejecting the Mortgagor. In whom is the legal title? After the pay day there has been no doubt where it is. Before this time some have doubted, but it is now settled that the legal title is in the ~~Mortgagee~~ Mortgee from the date of the Mortgage. This will appear ~~by~~ reasonable by considering the nature of the deed. It is, in the M-g-ee, an estate in fee simple conditional, liable to be defeated on a contingency. This was considering it before the pay day. After that & failure of the Mort-gor the estate in Law, is a fee simple absolute. But in Equity there is a right of redemption. the real, beneficial interest is in the Mort-gor, & the land is still consid[d] a pledge redeemable at his pleasure.

The decree of Chancery does not operate in rem so as to give a title to the Mort-gor, for the title in Law is completely in the M-gee. & Chancery has not power to say that the title shall be the M-gor's

But the same thing is effected by giving so large a penalty upon the M-gee if he will not re-convey to the M-gor as will compell him to

The History of this affair is this- When these cases first came up there was no Court of Chancery, & Courts of Law supposed they had nothing to do with contracts so clearly settled by the parties- They therefore suffered the M-gee to hold an absolute fee simple after the day & failure of payment- Such great injustice was done in this way by avaricious men imposing upon their negligent debtors that when the Court of Chancery was established they wished to invent some method to prevent fraud of this kind- They thought it would be too presumptuous in them to alter the established title in direct terms & therefore took the round about method of decreeing that unless the M-gee would convey he should forfeit a penalty which they would fix high enough to compel a conveyance. This decree was paramount to all other titles-

Payment or tender of payment before the pay day revests the title in the M-gor- but his situation is critical for he is to prove the tender of payment, while the M-gee has a deed of the Land- The title therefore frequently is not in the deed, but depends upon a matter of fact to appear in evidence- The tender &

Of Mortgages

If the M-gee was in possession at the day for redeeming, the M-gor might bring his writ of ejectment before a Court of Law, & in this way the title would be tried — & if he proved Paignt the Ct would ~~put~~ give him the title — But if the M-gor had remained in possession there was no way for him to try the title before a Court of Law — Chancery must then be applied to — They would order the M-gee to reconvey on penalty &c — & if he was unable to pay the penalty, the Court would quiet the M-gor in possession, by decreeing ~~that he should~~ the land absolutely to ~~him~~ & declaring that no man should disturb him — This decree operates in rem & is paramount to all their titles —

If the M-gee should bring a writ of ejectment against the M-gor, this would answer every purpose for the trial of the title would come up —

The reason why Chancery took up these matters was on the ground of their power to compel the execution of trusts — They consid^d the M-gee as trustee to the M-gor —

Chancery fixes a day on which the M-gee shall reconvey & on failure the penalty is forfeited & this is never chancered —

The M-gor is not liable for rents, altho the title ~~of the land~~ is the M-gee's — for the land is only a pawn for a debt on interest, & no injustice is done to the M-gee —

The M-gor's remaining in possession depends entirely upon the will of the M-gee. In this light the M-gor is a mere tenant at Will, but is different from ~~Tenant~~ tenants in respect to the Emblements. These the M-gee takes when he enters. His going into possession however has no effect upon the debt, for he is liable to account for the rents & profits to the M-gor & if these overgo the debt he must pay the balance to the M-gor.

The M-gee shall be allowed for such improvements as are useful to the M-gor with interest 3 Mc 518, but if he has built an elegant house which the circumstances of the M-gor did not require, or otherwise laid out unnecessary expence he shall not be allowed any more than what would have made the necessary improvements. It is difficult to determine at how much the Profits shall be computed as some would raise more than others. The M-gee however must have acted a prudent & reasonable part, or the Profits will be computed higher than he has received. All the circumstances are taken into consideration, as the M-gee's negligence what the land could have been let for &c &c —

The Equity of Redemption is so incident to a mortgage that it has given rise to the Maxim "Once a Mortgage always a Mortgage" All agreements to have it irredeemable, or condition of the M-gee's paying a greater sum &c &c are idle —

Atti. Mellen 1822

Mortgages

Lecture 9th D 1794 June 10th

Sometimes the condition to a m-ge is attached to the deed itself. Sometimes a separate defeasance is given by the m-gee. There are equally good between the parties but different as they respect the purchaser — for as the m-gor keeps the Defeasance & the m-gee the deed the latter might be recorded first & thus deceive purchasers as to the title &c — When the condition is attached to the deed whoever buys of the m-gee takes it with the incumbrance of the m-gor's right of redemption but when a separate defeasance was taken & the land aliened by the m-gee the m-gor must file his Bill & Chancery will decree that the ~~purchaser~~ m-gee shall either reconvey to the m-gor, or forfeit a reasonable penalty about the worth of the land. The ~~purchaser~~ m-gee has his election which to do & if he pays the penalty the land is irredeemable. This is an exception to the Maxim "Once &c" —

The m-gor may sell his Equity of Redemption & if the m-gee purchases it, the Mortgage is defeated & the old maxim again broken in upon. 15 Viner 468 1 P. Can. by Brown

When a man wishes to advance his relation & has the money at command conveys him a piece of land to be defeated on payment of the sum he wishes to advance & the

M gor dies without redeeming the land is then irredeemable - or Suppose there had been a precedent debt & the m gor made this condition that "if he had no issue male then the land to be irredeemable" In both these instances the right of redemption is defeated on the ground of its being a family provision 2 Vern 361 Hard. 511

It has been a question "Whether a parol agreement could be annexed to a deed & make the conveyance a m ge but it is determined that it cannot for this would be varying the estate from a fee simple absolute to a fee simple conditional & the salutary maxim violated "That no parol agreement shall be let in to vary the operation of a writing" The m gor however, may appeal to the m gee's conscience & if he acknowledges the parol agreement the Ct will decree it a m ge this being consid as good as written evidence as no man could be supposed to take a false oath against his own interest And if the m gee had promised to execute a defeasance there is evidence of this Chancery will compell him to execute it - 3 Atkins 389. 3 Woodes - 430 P Can. 526

If the Parties have so treated the conveyance that it is manifest they consid it a m ge Equity will consider it so likewise

Where a conveyance has been made to

defraud Creditors, Courts to discountenance such transactions, will not suffer it to be redeemed —

A Mortgee may eject the Lessee of the Mortgor if the lease was granted after the mortgage Doug. 21. 2 Cro. 550 11 Coke Rep. 51 - Car. 304 —

Every person who has any interest in the estate may redeem, as heirs devisees Creditors &c except as we shall hereafter see, the wife

A Lessee of Mortgor may redeem —

The Mortgee may treat the tenants of the Mortgor as his own by taking the profits from them &c Doug 200 - 3 Atk. 723 —

The Mortgor must not commit Waste if he does Chancery will grant an injunction against him Doug - 670 —

Lecture 10th June 11th D 1794

There is a practice in the United States of selling real property at Public Vendue to pay taxes - This may be redeemed within a year & then the generally received opinion is that it is irredeemable — This a Stat. provision — Here we have a Stat. explanatory of the former Stat. by which Creditors are authorized to redeem after the year has elapsed - Some doubts have been raised from the words of the Stat which says that unless the debtor redeems within the year limited, an absolute fee simple is vested in the Purchasor. Mr Reeve Jusp

poses that this term expresses the same as the same technical term does in other mortgages, & as that the Legislature must be supposed to be acquainted with the technical terms, when they make use of them they must be taken in the same sense as they are in Courts. It is his opinion therefore that these conveyances were always mortgages. The last mentioned stat. plainly shews that the Legislature had also consid. the Debtor as having an Equity of redemption. The substance of this stat. is "That if the debtor does not redeem within the year, after that his creditors may redeem & shall hold the land as a mortgage liable to be redeemed by the debtor." It is easy to see, therefore, that this is a Mortgage, if not in the strictest sense yet in effect. for the debtor if he had no creditor might make one & suffer him to redeem. then redeem out of the Creditor's hand.

From this it appears that the Legislature meant not to deprive the debtor of his Equity of Redemption, but only to limit a time after which it should be consid. a neglect in him not to redeem. That a petition in Chancery by a Creditor might be preferred to one by the mortgagor (No decision yet on this subject).

Another exception to the Maxim "Once a Mge & always a Mge" If the Mgee brings an attachmt on the land he abandons it as a security & it ceases to be a mortgage —

The money laid out by the Mgee for improvemt is to be allowed him with interest 3 Atk 518

The Mgee must not commit waste At Law there is no restraint to his committing waste — but Chancy will grant an injunction — Chancy will value the waste & consider it as rents & profits to sink the debt 3 Atk 725 — If the heir will not redeem Creditors may —

In case of a gratuitous conveyance if the grantor owes — ~~Some has~~ It has been a question who had the best right the Creditor or the Donee There is no doubt as ~~to~~ between the Grantor and donee — But creditors have a higher right than donee — on the solid principle that a man ought to be just before he is generous —

The wife has no power to redeem her husbd land — But she may be endowed in mortgaged lands if she will pay 1/3 of the interest of the debt — 1 Atk. 603 — 2 Vern 304 — If so man devise an Equity of redemption & it will pass under the name of "Lands" see page 277.

If the estate mortgaged is sufficient to pay off all the debts a 2nd Mgee has every benefit

of the m-ge that the 1st has except the legal title — The moment the 1st M-gee's title is defeated it vests in the 2nd & the same benefit ~~is~~ extends to all ~~future~~ succeeding M-gees — 7 Viner 52 —

If an equity of redemption is devised to one for life & another in remainder — The devisee for life may redeem & his heirs may hold the estate till the remainder man will pay two thirds of the mortgage money & if the remainder man redeems the Devisee for life must pay one third or he cannot take possession — a life estate being considered ~~as one third as good as one third~~ ~~Law estate in fee~~ one third as good as an estate in fee simple — Altho a Court of Law considers the equity of redemption as nothing, yet Chancery will order it to be sold to pay debts if the heir will not redeem — 3 P Wms 341 — 2 P Wms 412 — 2 Atk 50 — A Court of Chancery takes away no rights of persons having a lien upon the land by making it Equitable assets — Here the Equity of Redemption is inventoried & treated as other Freehold Property —

Lecture 11 — June 12 — 94 —

An officer may attach an Equity of Redemption as real Property altho in the hands of the M-gee This don't affect the rights the m-gee but takes away those of the m-gor —

~~The M gor~~ After the land is attached if it is appraised & the Creditor puts himself in the place of the m-gor — the m-gor cannot redeem unless he pays all debts due from him to m-gee whether contracted prior or subsequent to the date of the M-ge — This is to be understood as between the m-gor & his representative & the m-gee & his representative — It was formerly the law that the Devisee need only pay the money stipulated, but it is now settled to the contrary — When a 2d m-gee claims, the first can redeem by paying the sum stipulated in the first m-ge ~~& that the 2nd m-gee may~~ 2 Atkins 53 1 Vesy 87. Atk. 556

Before a Ct of Equity will aid a m-gor they will oblige him to do complete justice in form. Scientia — It is a principle established in the Books that if the M-gee fraudulently conceals any debt contracted by the M-gor antecedent or subsequent to the Mortgage, a Creditor may redeem by paying only the sum stipulated — From this it is natural to conclude that he could not if there had been no concealment without paying the other debts — But this is not the case ~~1 Ch Cases 165~~ Courts have made this exception — That the Creditor may redeem by paying debts contracted antecedent without paying those subsequent to the mortgage —

Mortgages

If the m-gee sells his mortgage under value & the m-gor wishes to redeem by paying this smaller sum, Court will not suffer him to for if the purchaser has made a bargain it is his & not the m-gor's - 1 Salk. 155 - Rac. C. 511 - Yet if the heir purchases for less, the Creditor may redeem by paying that sum only - Rac. C. 89. 2 Vern. 1107 - No Stat. of Limitations runs on an equity of redemp^n. nor does length of time of itself bar the Equity - But length of time connected with other circumstances will destroy it. Wherever the m-gor continues in possession no length of time operates to destroy the Equity nor if the m-gee has received interest within 20 years - To make length of time equal to a Stat. of Limitations the m-gee, after the Law day or forfeiture, must have remained in possession 20 years & nothing must have been done by the mor-gee alone, or by him & the m-gor together to show that they consid^d it a m-ge 3 Will^ms 288 - 3 Atk. 393 - When this limiting time has begun to run and afterwards some disability intervenes the time runs on notwithstanding 2 Atk. 393 -

There are a kind of M-ges called Welch mortgages which are liable to be redeemed at any time to end of the world - There are conditioned ~~to be~~

Mortgages

that if the money be paid on the 1st of June &c or on the 1st of any succeeding June to the end of the world, then the mortgage to be defeated.

The M-gee may bring a bill in Equity to foreclose the Equity of redemption —

If the m-gor applies to redeem, he must pay all the debts due from him to the M-gee, but if the m-gee bring his Bill for the m-gor to redeem or be foreclosed the m-gor need only pay the sum stipulated in the mortgage.

If the m-gee sells a m-ge foreclosed & it falls short of the debts he will endorse it on the bond & if it overgoes he must account for it in Equity.

When a foreclosure is once effected it operates to pay the debt. That is so that the m-gee cannot bring any after suit for the debt —

Lecture 12th June 13 34 —

Originally Courts of Equity entertained the same ideas as Courts of Law respecting lands descending to the heir. They supposed the beneficial interest as well as the legal descended to him — But now upon the death of the m-gor the nominal ~~legal title~~ interest vests in him & the beneficial interest in the Exr. In case of a trespass upon the land the heir must bring the action & the damages are recovered they go to Exr

~~If the M gee wishes to convey~~ The heir is compellable to the Ex^r or pay the m-ge money in Chancery to give a title. A mortgage in a m-gee is ~~pers^l prop^y~~ See 2 Vern 621 "Lands, tenements & hered^ts" as a general rule will not pass m-ges. The term "pers^l prop^y" will If however it is plain that the testators intention was to pass m-ges under the term "Lands &c" Courts will suffer that to rule Any expressions clearly indicative of his intent to pass a m-ge will answer the purpose 2 Bur 978. If the M-gee in his will orders the m-ge money to be delivered to "the heir or Ex^r" it may be paid to either & if to the heir he is trustee for the Ex^r. 2 Vern 343. Hard. 467.

~~If the m-gee's heir chooses to pay the m-ge money he takes the land & the money goes to the m-gees Ex^r being pers^l Assets~~

As the m-gee takes the land ~~in~~ security for a debt as to him & his heir it is pers^l prop^y. But when assigned by him, the assignee takes it not in security for a debt but as real Property If therefore will go to his heir & not to his Ex^r In case of a devise the m-gee may consider it personal or real & Courts will consider pers^l or real according to his intention to pass it to the heir or exec^r If a m-ge is created by words of joint tenancy &c will not gratify the parties by suffering a right of survivorship But it is a tenancy in com. 2 Very 258

It may be an important question in this country whether the Exr might not bring the action to foreclose instead of the heir. Why should the heir be obliged to bring an action & subject himself to a Bill of Costs, where he can derive no possible benefit? It is certainly an idle business — After the heir has foreclosed if he will pay the mortge money to the Exr he may hold the land in spite of every body —

Foreclosure

It frequently happens that the mgees wish to make a family provision, or want money to set out in trade &c, they wish therefore to have either the Mortgage money or the land given in security. By petitioning to Chancery they may have the mgor's right foreclosed. The Ct will fix a certain time for the mgor to redeem & if he fails that his right shall be forever barred. 2 Vern. 385

There have been attempts to foreclose before the forfeiture — Cts however will not suffer this in any case —

The mgor shall not impeach the title he has given to the mgee on the ground that no man shall impeach an instrument to which he has given warranty which is an estoppel in pais or in law.

Other persons interested may impeach the m gee's title 2 Atk 384

A m gee may pursue all his remedies at one time foreclose attach &c 2 Atk. 344 If the m gor is dead the Bill must be brot against his heir Or if it is requested the Ex's must be joined with him 3 P Wms 393 When Chancery fixes a ~~number~~ time for redemption or foreclosure the mean Calendar months The M gee may prefer a foreclosure against ~~all~~ not only the m gor but all the incumbrances at the same time if he brings it against the m gor only he alone is foreclosed &c Infants may be foreclosed But they are ~~at liberty to have~~ the allowed 6 months after ~~after~~ they come of age to enquire into the affair before a Ct of Chancery, & if there has been any unfairness or any fault in the Guardian &c the Court will open the foreclosure 1 Ch. Ca. 301 3 P. Wms 504 3 352

Notwithstanding what may be said about a foreclosure; it has rarely the effect to make the mort ge irredeemable There are numerous circumstances, with one of which if the case is attended, the Ct will open the foreclosure & make it redeemable. The foreclosure will be opened if there was any fraud made use of to obtain it Our Courts have established an Equitable princi-

ple variant from the English — They will not foreclose if there appears to be any great disparity between the mortgage money & the estate mortgaged — English Courts will foreclose where there is a disparity & altho they are sensible they shall open it again — Our Courts consider this an unnecessary & idle farce —

Lecture 13th June 14 1794

A Decree of foreclosure may pass against feme Covert, & no time is given when they may enquire into the cause of the foreclosure before Chancy. They shall not suffer from the negligence or coercion of their husband — 2 Vern 50 — 3rd — 238 — no length of time shall operate to prevent her from calling in question the title —

Where there are other Creditors besides the mortgagee the foreclosure will be opened or any unfair consent of the mortgagee to defraud other Creditors & mortgagees will furnish a ground for opening —

There is a case in Barnardiston 221 where the foreclosure was opened on account of disproportion between the debt & the worth of the land —

There is no opening for a volunteer as a donee & devisee —

That a Welch mortgage cannot be foreclosed see Vesey 406 —

In Salk. 276 see the Principle of a m-gees waiving his foreclosure &c

The Rule of the debt being satisfied when there is a foreclosure, would give but an inadequate idea of the Subject — for the m-gee may bring his action at any time on the bond but by this he waives the foreclosure — If the m-ge was sufficient for the debt, the m-gor may bar a recovery in a suit on the bond — for the m-gee has received enough to satisfy him & it is unreasonable in him to demand more — But if the security was insufficient the m-gor cannot take this advantage —

The m-gee may have his choice either to take the slow method of recovering his debt out of the rents & profits, or file a Bill to have the security sold, & in this case the m-gor takes the surplus — or he may obtain a foreclosure & sell the land himself — But if there are other Creditors & mortgagees, & a sale will prejudice them Chancery will not decree a sale — And when they decree a sale no more is sold than is sufficient to pay the m-gee —

In 1 Ch. Rep. 6. 414 there is a case where there was great disproportion & a parol agreement that the m-gor might redeem — but 20 years the m-gee had been undisturbed — Chan.r would not suffer a redemp.n

In 2 B. Par Ch. 111 a case where the court would not open as the m gee had entered & had remained ~~all the~~ for a while undisturbed & had layed out great expence on the farm —

If the m gee has unfairly concealed his incumberance & in consequence ~~of~~ this another has taken a m ge the 1st M gee's claim will be postponed to the 2d — See 2 Atk 49. 1 Wms 39. & 139. There is a case contradictory to these in 1 Bro 6 — Honest negligence in the m gee will furnish a ground for postponement 1 Bro. 357.

If the m gee does not obtain the title deeds he must suffer the consequence — As if the m gor should shew his title deeds & mortgage again & on the strength of this borrow money the 2nd m gee shall stand in the place of the first In. 3 Wms 280 1 Vern 300 These are instances when the m gee denied that he had a m ge & yet was not postponed — The m gee supposed it an inquisitive question which the inquirer had no business to ask — But if he had told the m gee that he was about to take a m ge provided he had not one the m gee would have been postponed — In this State we have no such regulation of postponing as we have Records & those who take succeeding m ges need not be deceived if they will examine them —

But where deeds are not recorded the same reason holds here. So that we ought not to be ignorant of the Eng Law

Where there are several mgees he who has the legal estate has the prior right A 3d mgee may purchase the 1st Mgee's title & protect himself against the 2d. See 2 Vesy 573 2 Vent. 337. 1 Eva. 240. Hard. 318.

It makes no odd whether the puisne incumbrancer had paid for the legal title or not if he has it he can take advantage. The Ct have even gone so far as to give the preference who has obtained the legal title by fraud yet if he knew of the 2d incumbrance when he purchased the legal title, he shall not protect himself 3 Atk. 238. And he is not benefitted if the title is defective 1 P Wms 340. The principle of a puisne incumbrancer obtaining the legal title & protecting himself against an intermediate incumbrancer is ~~not warranted~~ a violation of private right not warranted by reason or justice

Lecture 11 June 1794

If the 1st mgee has also a lien upon the land by judgmt, as by Stat. Merch's Stat. Staple or Recogn^ce he may tack this to his mge & protect himself against all other incumbrancers - unless he knew

If he had no notice of these, the 2d m-gee cannot redeem without paying both debts —
To give the 1st m-gee this advantage the debt must have been contracted & the judgmt obtained by himself, not purchased —

If a 1st m-ge is defective which would be made good in Chancery, the 2d m-gee shall have the preference altho he knew of this defect. For he has the Legal & Equitable title & there together are superior to the Equitable alone — 1 Vern. 240 — Tho' the first m-gee's title is defective he shall be preferred to all creditors — 2 P. Wms 491 good — 2 Salk 449. 3 Bac. 644.
Some men, Merchts in particular frequently provide that the land m-ged shall be a security for all subsequent debts to be contracted between them — In those instances as between the m-gor & m-gee the terms of the contract shall be literally complied with — the m-gor cannot redeem with't paying all debts —
The only advantage that first a m-gee has is that when he comes to foreclose the m-gor must pay all the debts — while in Common mortgages, he need only pay the m-ge money. But other m-gees not knowing the terms of the 1st m-ge shall not be affected by such a m-ge — yet if before they took m-ges, they

knew the terms of the 1st mge it was their own folly & the 1st mgee shall have all his debts before they can claim &c. Vin. 52

If a mge is given to one as trustee, a 3d mgee shall not protect himself against a 2d by purchasing the trustees title Salk 680. 3 Atk 360 1 Atk. 475

It is common for mgees to join & petition for a sale of the mged premises when this is done the mony is distributed according to priority. If there is only enough to pay the 1st mgee he takes all &c In such case a 3d mgee shall not avail himself of having purchased in the first incumbrance 2 Vez 571 & 2 Atk 809 Finch 320

If the principle is just that a puisne incumbrancer should protect himself against an intermediate one by purchasing the 1st incumbrance, what need of these exceptions? It is manifest from the Ct's squeezing these cases out of the rule that they are impressed with the injustice & unreasonableness of it.

Where a foreclosure has been obtained & it can be proved that the mgor previous to the foreclosure had tendered the mony to the mgee &c the Equity of redemption will revive.

A mge is obtained & after that the mgor becomes

Mortgages

a Bankrupt & Mortgages the same land a gain - altho the 2d mortgagee did not know of the Bankruptcy he cannot protect himself by purchasing the 1st incumbrance for the mortgagor's estate on his Bankruptcy vested immediately in the Commissioners to pay debts contracted previous to the 2d mge -

It will not avail a man to plead ignorance that there was a deed, where there are Record kept & he might have seen it by searching - The Law implies that he had notice - This is called ~~Called~~ constructive notice -

If a deed was mislaid or lost thro the carelessness of the Register he shall be liable for damages that happen to be sustained in consequence of it -

A Deed is taken & not recorded, & another deed is given of the same land & recorded immediately first, the 2d grantee shall have the preference, if he was a bona fide purchaser, not knowing of the first deed - 1 Vern 64 -

But if there had been no negligence on the part of the 1st grantee he shall have the preference - as if he is at a distance from the Record & means to get & have the deed recorded in in a few days when he shall be going that way

Lecture 5 — June 17 94

Where there are several m gees & a subsequent one brings an ejectment he will eject the m gor unless the prior m gee interferes to prevent it The m gor has no right to say that he has no title for as to the m gor, a subsequent m gee has a complete title If a prior m gee prevents a subsequent one from entering, as he may by ejecting ~~him as the m gee to must~~ the m gor himself in such case as between him & a subsequent m gee, he must account for the rents & profits as if A the m gee ejects B. m gor, & suffers ~~the B~~ him to take the rents Upon a Bill by B. to redeem A. has not to account for the rents but if C. a subsequent m gee brings his Bill against A. he must account for the Rents & profits Pr. C 30 3 Bac. 658

If therefore the prior m gee has suffered the m gor to remain in possession or to take the profits against the will of the subsequent m gee he must himself account for profits &c

How can the m gee ~~cannot~~ use his m gee so as to injure the m gor A m ges to B A remains in possession & leases to C as he may for 5 years If C does not go out at the end of this term A. may eject him it does not lie in the mouth of C. to say that A has no title In this case B brings

brings an ejectment against C as he may & prevents A for C is not liable after judgm^t in favor of B to be ejected by A. B having obtained judgm^t suffers C to remain in poss^n paying nothing. B shall account to A the m^gor for the Rents & profits ——

A m^gee to B remains in possession B sells to C. A brings his Bill to redeem against C. pays to him the m^ge mone. But B had entered & received profits before he assigned to C then entered & rec^d profits. Suppose the m^ge was for 100£ principal & interest when A brot his Bill the profits rec^d by B. were 30£ the profits C had rec^d was 30£ A. then owes but 40£ yet C is to account only for what he rec^d & B is to be made a party to the Bill that he may be made to account for what he rec^d & the decree will be form^d according to the circumstances of the case so that A the m^gor cannot loose any thing. A subsequent m^gee comes to redeem. the account as stated by m^gor & m^gee binds him unless there is collusion 3 Bai. 659 The mode of accounting where the profits exceed the interest. Suppose the interest 9£ & the profits 20£ here is a surplus of 11£ the

Principal to produce 9£ interest must be 150£ Apply annually the surplus to sink the principal for the 2d year it leaves only 139£ on interest & so on 2 Atk. 534 —

The m gor dies — the Equity descends to his heir & the Personal Estate to the Exs — The heir wishes to redeem, he shall have aid of the Assets in the Exs hands to redeem the Land — The enquiry is what fund ~~is to be~~ benefitted by the m-ge & from that fund take the money to redeem 2 Salk 449 6 3 P.C. 520 — 3 Dr 14 — Hard. 512 —

The Devisee of Real Estate may take the like advantage of redeeming by the Personal Assets — 1 Atk. 487 — & where Lands are devised for payment of debts the legal construction is that this is to be done only upon deficiency of Personal Assets — 2 Vern 349 — 3 P.C. 290 — But a man may exempt by express words his Personal prop: 1 Vern 51 —

The rule that the heir may have the benefit of the Personal estate to disincumber the Real does not obtain against Creditors or general Legatees for they must be paid before any aid is given to the heir — when they are paid what remains may aid the heir in preference to the Residuary Legatee —

Mortgages

Lecture 16th June 18 1794

The purchasor has an Equity of redemption and shall his heir have dit of personal Assets to red. m.g? No – for in this case the personal fund was not benefitted, the purchasor when he bought the Equity intending to make an addition to his real estate – In the other case the m-gor had bettered his personal Estate as much as the debt ~~was worth~~ he owed the m-gee, & on this account the m-ge was redeemed out of that fund – But the heir of the purchasor must redeem with his own money – 1 Br. Can. 101.

It has been a great question whether the wife of a m-gor might be endowed in his Equity of redemption – This distinction runs thro the cases – where the m-gor still retains the fee having m-ged only for a term of years, she is entitled to dower – but where the m-ge is in fee she is not 1 Atk. 606. 2 Atk. 526 – Rec. Can. 137. The first cases in which this principle was established were those where the land was m-ged before coverture & the wife not endowed on the ground of the husband not having been seized during coverture – This circumstance was not attended to when other cases came up where the land was m-ged after coverture & thus a set of precedents came to be established without even a legal reason to support them –

The wife of a mortgagee is not entitled to dower it being personal property. —

The husband by mortgaging the wife's land passes his interest therein but cannot bind her or her heir. Yet a mortgage by the husband & wife may be confirmed by the act of the wife after coverture is ended Doug. 53 Co. Lit. 201 2 Wms. 127 2 Vesy 526

When the wife's estate is mortgaged by fine if the husband dies the is entitled to his personal assets to redeem her land 1 P. Wms. Gate vs Austin.

If the husband & wife purchase land & mortgage for his debts, she may after his death take his personal property to redeem

Where the husband's estate is under a mortgage & the wife joins with him & mortgages her own estate to disencumber his upon his death the wife shall stand in the place of the mortgagee with respect to husband so disencumbered and hold the land till redeemed by the Exors or Creditors. ~~Current to all creditors 2 Vk. 384~~

When the husband dies, his wife's choses in action goes to her as a general rule, but if the husband before marriage had made a settlement upon his wife which Chancery shall judge competent this will be considered a purchase of her choses in action & on his death they go to the Exors. So where the wife is mortgagee, & the mortgage is not redeemed during coverture, the mortgage is hers unless the husband has purchased her estate by a competent settlement

A settlement after marriage & not in pursuance of marriage articles but voluntary will have no such effect 2 Atk. 444

As the wife's mortgage is personal estate the husband may release it to possession & if then goes to his Exr — an alienation for a valuable consideration is releasing it to possession; & if the husbd creditors have got hold of the wife's mortge they will hold it 1 P Wms 558 — 3 P Wms 197. But had such mortge been secured to the wife by articles before marriage it would have secured it from creditors 2 P Wms 316

& Court of Equity would not even permit a mortgagor of the wife to pay the mortge money unless the husb would make a suitable settlement on the Wife 1 P Wms 382 Yet it would aid the particular expence for valuable consideration

Interest

It is a rule in chancery that if the condition in a mortge carries more than legal interest, the Chancellor will not say that the deed is void but will only exchange the illegal interest — Where the contract is for a certain interest below what is legal as 4 per Cent & a proviso that if that interest is not paid by the time it shall carry 5 per Cent Chancery will

consider this a penalty & relieve against it
But if the contract is to receive legal interest & if
paid at such a time an abatement is to be made
if the m gor is punctual, the abatement will be
made, tho it not paid at the time then shall
be no abatement 3 Atk. 520 - 3 Bus. 1974-

When the m gee sells the m ge with the m gor's
consent & the purchasor pays the m gee prin-
cipal & interest the whole now becomes prin-
cipal in the hand of the assignee & carries in-
terest - But this assignmt must be by the consent
of the m gor to have the assignee take this advan-
tage 2 Atk. 271-

Where the m gee enters & the profits
fall short of the interest, yet this surplus of
interest does not carry interest -

If the m gor or m gee file a Bill to have
the account liquidated & the Master of the Rolls
makes a report, it is all consid principal &
carries interest - 1 P Wms 178 - But where there
are creditors & subsequent m gees, whose interest
is affected by this compound interest the rule is
dispensed with - 3 Atk. 722 - It is likewise dispensed
with when infants are concerned, unless they cause
the liquidation themselves 2 Rac 225 2 B.C.C. 56
1 B.C.C. 447 - 12 Viner - 113 - After the account has
been made by gor & gee, the mere signing of the m gor does
not make the interest principal so as to draw interest -

Mortgages

Lecture 17 June 19th 94

Contrary to what Mr Reeve laid down in the last Lecture Wooddeson Laws the Wife can take dower of ~~land~~ in Equity of in all cases except where the Lands were mortgaged before marriage — The husb cannot be tenant by curtesy of Lands held by the Wife as in fee

Of Interest

Miscellaneous Principles

An agreemt entered into at the time of the mortgage that the interest that shall accrue shall be made principal & draw interest if not paid annually is a void agreemt & shall be void Salk 449 — This Rule in Chancery is conformable to the rule of Law in such case — But an agreemt afterwards that the interest that has already accrued shall be principal is good at Law and Equity & will draw interest 2 Atk. 331 — So also in the case of a Book account if the debtor agrees to pay interest & gives his obligation for it it is a valid agreemt 2 Atk 331 — If the title of the mortgagor is attacked the mortgagee is not obliged to spend money to defend it, but he may if he does it shall be added to the principal & draw interest — 3 Atk 518 —

Mortgages

When land is mged & there is a tenant for life of the Equity of redemp^n in possession, the remainderman can compel him ~~to~~ deliver in Chancery to keep the interest down, or the remainderman may redeem & the tenant must pay him one third of the Redemption money, or quit the possession. Tenant in tail is not compellable by Remainderman to keep down the interest. 1 Vesy 447.

The operation of a tender after forfeiture ~~is, that~~ when the sum can be ascertained is to prevent any further interest accruing, tho it does not revest the title. If Notice must be given when the tender is to be made it be made accordingly.

The rate of interest originally reserved upon a mortge may be altered by a parol agreement when the agreement is not to enlarge, but diminish it 3 Bro. 580. This must be founded upon a principle operative in the English Law That a man may waive his right, & if evidence can be produced that he waived his right by an agreement it will be binding upon him who waived his

Provisions by the Stat. of New York

We have a provision for the sale of the Estate of absconded mortgagors to pay mortgages the money. The land is to be sold & the Sheriff

must execute the deed of sale - the surplus is to be put into the case of Chancery to be paid to the mor or his return - Seven years are allowed the mor to call the mee to account, & when he has received too much to refund - Mges are by this Stat to be registered & acknowledged or proved before a magis trate by the Subscribing witness - When there is a Secret defeasance, that is also to be registered the first registered of two mges to prevail if bona fide made - They have recognized the power of the mor to authorize mees to make sale of the mge - & in such case no equity of redemption remains but a right to the surplus, does not extend to affect the right of redemption in a subsequent mee or other incumbrancer - This power to sell is to be recorded, and not valid when executed by any person under 25 years of age - The sale must also be at Public vendue -

Of Estates upon Condition

These are such estates whose existence depend upon the happening or not happening of some uncertain event, by which the estate may be created, enlarged or defeated. These are not a distinct species of estates but qualifications of others as any quantity of interest as a fee simple, fee tail for life for years &c may depend upon these conditions. These conditions are called precedent or subsequent according as they are to commence or be defeated. An estate to commence on the happening of an event uncertain, is on a precedent condition one to be defeated on a contingency is on a subsequent condition. Where the condition is subsequent the Estate commences immediately ~~but where it is~~ but where it is precedent it never can commence till the event happens. In the former case if the thing to be done which defeats the estate is unlawful the estate is completely vested the condition being considered void. In the latter case of a precedent condition, ~~if it be to do an unlawful act~~ the estate cannot commence till the performance of the condition & if it be to do an unlawful act it cannot vest on the performance of the condition. for no man

Of Estates on Condition

shall acquire property by violating the Laws of the land

No Estate of freehold can commence on a precedent condition unless a prior freehold is given in præsenti —

If A grants an estate to B. to be defeated upon the happening of an event & the event happens the grantee will continue to hold the ~~Land~~ estate untill the grantor or his heirs enter or claim for a breach of the condition, but if it had been limited over to a 3d person, the grantee's estate expires with the entry —

Of Estates by Stat. Merch.t Stat. Staple & Elegit —

These are Chattels & go to the Ex.r for the mode of acquiring & them & what they are See Page 1 & Black. 2. Vol.

The Form of the action to recover is the same as if it was real estate —

Of Estates as it respects the number of owners in Severalty, Coparcenary, Jointenancy, Tenancy in Common —

An Estate in severalty is where one owns an estate in himself. independant of every other person This may be created by the alienation of jointenancy or coparcenary or tenancy in common by partition —

Of a Coparcenary Estate

This is where several own an estate that descended to them from some ancestor — All of them are in law but one heir; of course if an action is to be brot against the heir as such, it must be against all the parceners — an action by them also must be in the name of all Co Litt. 164. The entry of one parcener is the entry of all & the one who enters cannot avail himself of the Stat of limitations unless there has been an actual ouster. Sometimes a receipt of the profits may be under such circumstances as to amount to an actual ouster — but the mere receipt of the profits is not of itself sufficient — it must be a receipt claiming them as his own — Holding up an adverse possession may amount to an ~~adverse possession~~ actual ouster — where there has been an ouster the other parcener may bring an ejectment the nature of which is not to turn out the other parcener, but to let in him that is ousted & Lecture 18 p. 20 Partition may be made by agreement or by compulsory process

It is not an uncommon practice in Eq & Com to make a partition by Deed of agreement. But this is not warranted by the Stat. of Frauds & Perjuries the practice is for one to divide & the other choose — If the partition is by writ the Com Law

Of Co. Parcenary estates

mode is for one to bring the action stating all the circumstances of the case — but then could not agree &c & the P. must establish the title of both & the Court order the Sheriff to take 12 men to make partition — & their division is brot before a Court where objections may be made, not to the justice of the division but to the conduct of the Sheriff or jury —

In Com. the Sheriff takes 3 men who not directed by the Stat to prize the estate & divide it — he makes a return of his transaction to the town Clerk & it is conclusive

— is action of trespass or Waste lies between parceners — but if one goes into possession & takes more than his share of the profits the other may maintain an action of account against him — There is no right of survivorship among them — If one parcener dies his Estate is destroyed, & the other parcener & the heir of the one who died are tenants in Common.

Where the Estate is one thing that can't be divided, as a mill &c the eldest daughter has a right to pay the shares to the rest & take the whole — but the most common case in Eng & Con is to enjoy by turns &c

Of a Joint tenancy

This estate is always acquired by purchase when an estate is given to 2 or more persons without any words explanatory of the grantor's intention that it shall be a different estate, the presumption is that it is a joint tenancy — This estate may be for life, years, or in fee &c Both tenants must have the same quantity of interest; it must commence at the same time & be created by the same title — Joint tenants have no action of trespass, but they have of waste — formerly they could not compel partition but now they may by Statute the entry of one is of both & the possession of one the possession of both — In Eng. the survivor takes the whole here there is no jus accrescendi or right of survivorship this was abolished by our Courts without the interference of Stat — If an estate is here created which in Eng. would be a joint tenancy, it is a tenancy in Common — In N.Y. every such estate will be a tenancy in common if not expressed to the contrary by Stat

Of a Tenancy in Common

Every other mode of holding lands together besides what we have mentioned is a tenancy in Common — as if one holds by purchase & other by descent — one in fee & another in tail &c

Of Tenancy in Common

one by purchase from one person & the other by purchase from another — Never a joint tenancy or Coparcenary any way only let the unity of possession remain & they are tenants in Common. This estate may also be created by particular limitation in a deed as "a moiety to one & a moiety to another" "jointly & severally" & or "equally to be divided &c — They are compellable by Stat to make partition — liable to waste & account by Stat. — to trespass &c — Lecture 19th June 21st 97

Of a Reversion

Whenever an estate less than a Feesimple is created there is a reversion in the grantor — As if a man grant an estate for years or for life, he has the reversion — This Reversion is an estate descendible, devisable & in the hands of the heir, assets except in case of entailed estates & is then of no value — The Reversion is the residue of what was not granted with a returns to the grantor by operation of Law. It does not affect the heir as to grant & right till he can obtain the reversion —

Remainder

A remainder is where a less estate is given & that residue which would return to the

remainder
grantor or part of that residue is at the time
of the grant of the particular estate granted over
As if A grant an estate to B for years remainder
over to C in fee simple this is a grant of the whole
residue - had it been to B for years remainder to C
for life, there was a grant of a part of the Residue
only & the other part of the residue is in the gran-
tor - or had it been remainder to C for life, remain-
der to D in tail remainder to E in fee simple
then the whole residue which would have been
a reversionary estate in the grantor is parted with

A grant for years remainder in fee is not
making an estate in freehold to commence in fu-
ture or the remainder granted vests the freehold
instantaneously, tho' the enjoyment is postponed
To make a good remainder there must first be
created an estate less than fee simple This is obvious
from the term itself - Suppose an estate to A for
20 years remainder to B in fee simple good - but
an Estate to B in fee simple to commence 20 years
hence without an intervening estate is good for noth-
ing Freehold estates cannot pass in this way - but
estates less than freehold may pass - as an estate
for years to commence 20 years hence - An estate
at will is not such an estate as that a freehold

Remainder Contingent

can be limited upon it— If the particular estate is void in its creation or before as by forfeiture or surrender, the remainder is lost— The remainder must be created at the time the particular estate is given— the remainder must vest in the grantee during the existence of the particular estate, or eo instanti that it determines— An Estate is given to A for years remainder to B in fee simple the remainder vests by the grant it is an interest in B descendible devisable &c for the person who is to take by the grant is invariably fixed— But where it depends upon some contingency that may or may not happen it is a

Contingent Remainder

When this contingency happens the estate becomes vested for example. An estate to A for life remainder in fee to B. eldest son now born— At the time of the grant B has no son of course there is no person in whom it can vest & it is uncertain whether it ever will— But the moment B's son is born it vests provided A is alive— if A is dead altho B afterwards has a son, it cannot vest for the particular estate is determined before there was an opportunity in

the remainder to vest. To make these remainders good the event upon which they depend must be not only possible but what Lawyers call a common possibility not a remote possibility. As an Estate to A for life remainder in fee to the heirs of B who then is alive. This is good for it is a common possibility that B being alive will have heirs. But suppose it had been limited to A for life remainder to the heir of B's eldest son B. then having no son. Tho it is among the possibles that B will have a son & his son also have a son, yet it is so remote a possibility that the Law will not fullfil such limitations.

To make a contingent remainder it is not necessary that the person be ascertain but he may be [illegible] & the event upon which he is to take be uncertain. As an estate to A for life. remainder in fee to B. if he survives A. If it is asked 1st where is the fee in such case the answer is in B. for it passed by the grant. 2d where the fee is when an estate is granted to A for life remainder to B's eldest son who is not born. the answer must be either that the fee is in A before B wants to vest, or if this is a hor-

rible thing it is in the grantor to be diverted on the birth of B's Son - 3rd An estate to A for years remainder to B's eldest Son not so born, this is not a good contingent remainder, for to make it good it cannot be limited upon an estate less than freehold or the freehold, if the fee does not, must pass out of the grantor at the time of the grant - These contingent remainders are discharged whenever the particular estate happens to end before their time of vesting - as if the tent. for life should forfeit his estate or surrender it - To give effect to the grant therefore a method has been introduced of granting to A for life remainder to B & heirs as trustee (to preserve the contingent remainder) & remainder in fee to the heir of C -

The Law as it respects wills in this respect is very different - The Maxim of an estate, in freehold commencing in fut. &c is totally disregarded A devise of a freehold to commence on some contingency at a future period is good tho no particular estate is given - As a devise to A on the day of her marriage & as to what

Remainders by devise

becomes of the freehold in the interim, it is in the heirs of the devisor. A Remainder by devise may be limited to take place after a devise in fee simple upon the happening of some contingency which cannot be done by deed. As a grant to A & his heirs forever & if he die before he comes of age then to B. & his heirs &c. To make the Executory devises good the contingencies upon which the estates are to vest must be within a life or 21 years after. As to the son unborn of A when he comes of age.

By devise a term for years may be given to A for life & remainder over but by deed it cannot for the life Estate is at Law greater than the year estate.

Remainders over cannot be given to any person that is not in esse in the life of the first devisee.

Of the Law of Connecticut

Whatever may be or in Eng. be done by devise, may be done by deed also. To prevent perpetuities no estate can be given by either unless it be to a person in esse or the immediate descendent of such person.

1st An estate to A for 20 years, remainder to B in fee is a good remainder both in Eng & Connecticut.

2nd To A for 20 years, remainder to the eldest son of A who is not born it is void by the English Law as the freehold did not pass out of the grantor, but such a devise would be good — By our Law it would be good either by deed or will

3rd An estate to A for life remainder as before, it is a good contingent remainder by the English by deed or devise — good also by our Law

4th An estate to A for life & a remainder in fee to the heirs of B's eldest son, when B has no son is a bad devise as well as deed for the reason see Page 305 This would not be good under our law

Lecture 20th June 23rd 91

Here Mr Reeve repeated the Lecture, to be found in Page 68-98 viz On the Law of Distribution as an introduction to the doctrine of devests

Lecture 21st June 24 - 91

Our Law and the English differ in the Definition of purchased estate In England every estate by devise deed or gift &c is purchased estate, excepting alone that which descends by operation of Law In Con. Estates by descent

& by devise or deed of gift from an ancestor are placed on the same footing & every other mode of acquiring property is by purchase

The former kind of property viz by descent &c may with propriety be termed ancestral —

We shall now proceed to distribute property in a variety of cases by the Stat. of Connect. This Stat. embraces the whole English Law viz the Stat. of Car. & those cases determined under that Stat. in Courts, with some alteration, & if well understood will lead to a thorough knowledge of not only the Eng. doctrine of descents but of that of all the United States founded upon the Eng. —

Distribution of Property by Stat. of Con.

In the distrib.n of the following cases these directions are to be observed —

1st Calculate kindred as it is done in the Civil Law according to the practice upon the Stat. of Car. remembering always to take the express directions of the Stat. where that has preferred those who are more remote of kin & postponed those who are nearer —

2. Seat the doctrine of representation as is warranted by the cases determined under the Stat. of Car. —

Distribution by Stat. of Con

3. Distribute as if the words legal Representatives were misplaced in the Stat. & as if they stood immediately after "Brothers & Sisters of the ½ blood."

4. Distribute as if the Stat. read "to the next of kin to the intestate of the blood of the ancestor," instead of "to the next of kin to, & of the blood of the ancestor"

Unless these blunders are presumed, the Stat. will be found inconsistent with itself. Mr Sherman of N.H. was the draftsman of this act, & Mr Reeve observing the inconsistency of it as it now stands called upon Mr Sherman, who by looking at the Manuscript found that the above mistakes were made in the printed Stat. No case has as yet come up in which these principles have been controverted, but it is apprehended that these alterations will prevail.

Case 1st. John Stiles is dead leaving Real Property & left children Ned, Charles & Polly

Ans. They take equally

2. Same only Ned is dead leaving A

Ans. A takes per stirpes with Charles & Polly

3. Same but Charles is dead leaving B & C

Ans. A, ⅓ and B & C take equally with Polly ⅓

4. Polly is also dead leaving D. E & F.

Ans. They take per capita with A B & C

5. A. dead leaving G & H

Ans. G & H take, per stirpes, A's share

In Engl. & Stat. read per stirpes as ins. & kins leaving 6 issue - 3 by one sister, 2 by another & 1 by a 3rd. They take per capita, but if children & their issue, per stirpes, &c. &c. &c. Stat. taken — See 1 Ves. Sen. 56 — 2 Atk. 571 — 3 Atk. 8 — 1 Ves. sen. 444 — 1 Ves. sen. 228 — 2 Ves. sen. 548 — 1 Ves. sen. 444 — 1 Ves. sen. 228 — 2 Ves. sen. 548

6 J. S. left no issue & died seised of Black acre which came to him by descent, or by devise or deed of gift from his father Reuben Stiles, and of White acre which he bought with his own money. He left a Brother Sam Stiles of the ½ blood by father & Tom & Sally Stiles of the Whole blood & John & Susan Rowe of the ½ blood by mother & Mary Stiles his mother

Ans. Sam Stiles, & Tom & Sally take Black, & Tom & Sally alone White acre

7. Same only Tom & Sally are dead without issue

Ans. Sam Stiles takes Black acre, & Mary, White acre

8. The same only Mary is dead and Sam Stiles

Ans. B. acre as before & J. & S. Rowe, take W. acre

9. Same only Tom left a Son A. & Sally is living

Ans. Sam Stiles, ~~Tom's Son A & Sally~~ take B. acre, & A and Sally W. acre equally

10. Sam is dead without issue

Ans. A & Sally take both B. & W. acre

11. The blood of the Stiles is extinct

Ans. B. acre escheats & J. & S. Rowe take W. acre

12 Geo: Stiles, uncle of J. S. & brother of Reuben, alive

Ans. Geo: takes B. acre & J. & S. Rowe W. acre

13. Geo: is dead, but A the Son of Tom, & B & C the sons of Sally are alive

Ans. A. B. & C. take B. acre, in equal parts & J. & S. Rowe W. acre

14. Geo: is living

Ans. He, A, B & C take B. acre & J. & S. Rowe W. acre

Distribution by the Stat. of Con-

15. Geo: is dead, T. & is dead leaving D & E. & Sally is living—
Ans. Sally takes ~~Dower~~ ~~If Sally & John & Susan take W acre equally~~ ~~Sally & Susan take W acre~~ both B. & W acre

16. Sally is dead leaving B & C—
Ans. B & C take B. acre & John & Sus. Rowe W acre

17. B is dead leaving F. & C is dead leaving G & H—
Ans. D, E, F, G & H take B. acre per capita, J & Sus. Rowe W acre.

18. John Rowe is dead leaving J.
Ans. B. acre as before—J. takes W acre with Susan per stirpes

19. Susan Rowe is also dead leaving K & L.
Ans. B. acre title as before & J, K & L take W acre per capita

20. The Stiles are again extinct
Ans. B. acre escheats & W. acre goes to J, K & L per capita

21. J is dead leaving M.
Ans. B. acre as before—K & L take W. acre

22. K & L are also dead. K left N & O. L left P
Ans. Black acre as before—M. N & O & P take White acre

23. Some one Geo: Uncle of J. S is living
Ans. Geo: takes B. acre & W. acre

24 Solomon Stiles the Grandfather of J S is alive
Ans. He takes both B. & W. acre

25. Sol. is dead but Humph, Geo: the Great G. Father is alive
Ans. Geo: & Humphry take W & B. acre

26. Humphry is dead & George but Geo: left a son 2
Ans. 2 takes both white & black acres per Ns.

27. The only relatives alive on the part of the Stiles are 2 the son of Geo: & E. & S's uncle Edmund Stiles
Ans. Edmund takes both

Distributions by the Stat. of Connect—

28. Edmund is dead leaving R
Ans. 2 & R take both

29. 2 & T. G. & H are also alive & also S. the grand child of Sam Stiles the half brother —
Ans. 2 & T G & H, 2 R & S take B. acre & all except S share in white acre

The following cases relate only to B. acre

30. Sam, Tom, & Sally are alive. The estate did not come from Reuben but by deed of Gift or devise from Geo: Stiles
Ans. Sam Tom & Sally take equally

31. Reuben is living but Tom Sam & Sally are dead without issue —
Ans. Reuben takes

32. The Estate came from Moses Lamb by devise no way related to J S—
Ans. Reuben fills takes —

33. Same—only the relations are Mary & Reuben, Susan [illegible] Rowe —
Ans. Reuben & Mary take

34. B. acre came by deed of gift from Reuben & his only relation is Reuben —
Ans. It escheats —

Distribution of Real Property under the Laws of New York

1st case J S died seized of R. estate & left child & B.
Ans. All take equally

Distribution under the Laws of N. York

2. A was dead leaving D. B was dead leaving C & F. & C was dead leaving G, H, & I —
Ans. all the grandchildren take per capita —

3. The grandchildren are all dead each leaving children in unequal numbers
Ans. The great grandchildren take per capita —

4. A was dead leaving D. B was dead leaving E & F. C was living
Ans. D E & F take per stirpes —

5. D was dead leaving H & I — C was dead leaving K & L
Ans. H & I, E & F, and K & L take per stirpes

6. Same, only C is living
Ans. C takes 1/3 — H & I 1/3 — & E & F 1/3 per stirpes

7. J is dead w/ short issue, his father Reuben & his brothers Sam Tom Dick & Sister Sally Giles & John & Susan Rowe are living — Sam is an half brother as well as John & Susan —
Ans. All the brothers & sisters take equally as it purchased estate, Reuben may take it

8. Same — but Reuben is dead
Ans. Distribution as before All the mothers take —

9. Same But the estate descended to him from Reuben &c i.e. it is ancestral —
Ans. Sam, and Tom, Dick & Sally take

10 Mary Giles, is living the mother of J. Tom Dick, Sally & John & Susan Rowe & the estate came by devise from the brother of Mary
Ans. It goes to Mary unless the Stat. of Frames prevails which gives to the mother & the 2d degree to the brothers &c take.

On the above cases under the Stat of New York the following rules are to be observed—

Real Property

1— Lineal descendants are to take in equal degree of consanguinity per capita— as if all were childn—

2— If the claimants are of unequal consanguinity as if some were childn & others 2nd childn then per stirpes

3 Upon failure of lineal descendts the estate goes to the father unless it came to D.S. on the part of his mother— in such case it descends as if the father was dead

4— When there are neither lineal descendants nor a father, altho there be a mother yet the estate goes to the Brothers & Sisters as well to the ½ as the whole blood unless the estate is ancestral— Then it cannot go to the ½ blood unless such Brothers & Sisters are of the blood of the ancestor from whom the estate came—

5— Representation goes to Brothers & Sisters children notwithstanding the old stock are extinct, as in Engd.

Every case not within the Stat. is governed by the Com. Law of Engd.

Distribution of personal property is according to the Stat. of Car.

In ancestral estate those of the ascendg line are excluded

Distribute the following cases according to the directions now given

1st Ges: left no relative of the Miles but Ges: & he also left Jno & Rowe Distribute B. acre which descended from Reuben as if the word B "of the blood" meant lineal descendants or ancestors ~~are taken~~ in the feudal sense)—
Ans. It escheats

2. Ges relatives are A. the Son of Tom; & B & C the Childn of Sally are living & John & Jno Rowe distribute both estates as if "Representatives" mean the childn of the decd without respect to the old stock
Ans. A. & B & C take both B & M. acre per Stirpes

3. Same - but Ges: is living - distribute B. acre as if representation was considered as in the last case - also distribute it as if representation was understood in the sense we have heretofore considd it - also distribute it as if "of the blood" is taken in its feudal sense - also distribute it as if of the blood meant next of kin to, & of the blood of, the ancestor from whom it came & distribute M acre as if represent.n is to be understood as is supposed in the 2nd case
Ans. If representation is considd as in the last case A. B & C will still take per Stirpes to the exclusion of Ges: & the other relations
If represent.n is to be understood as we have

heretofore consid[d] it Geo: being of the whole blood & equal degree with A B & C will take with them

If taken in the feudal sense the estate will escheat

If of the blood means of kin & the Stat means as is expressed not of kin, & of the blood of, the ancestor from whom it came Geo: will take the whole

A, B & C will still take W. acre per stirpes

4. Pat left no relatives but I the Son of John Rowe and his sister Susan — distribute W. acre as if the words legal representatives are rightly printed in the Stat.

Ans. Susan take the whole, yet if the term "legal representatives" was placed as it ought to be I would take per stirpes with Susan

5. The relations are M the grandson of John Rowe & K & L the children of Susan now dead Distribute white acre as if there was no mistake in the Stat. respecting the terms legal representatives

Ans. M and K, L take per stirpes by the Stat as it now stands

6 The relatives are Geo: Giles, D & J C & the grandchildren of Tom & Sally, & M & C P the grandchildren of Mrs. Rowe Distribute B. acre as if "of the blood" was used in its feudal se-

Con Distribution

and white acre as if the terms legal representatives were rightly placed —

Ans. B. acre escheats & white acre goes 1/4 ~~Humphry, Geo.~~ to Geo:; 1/4 to D & E sons of A. 1/4 to F son of B., and 1/4 to G & H sons of C. the 1/2 blood relations ~~are~~ postponed to the Stat. to those of the whole in equal degree

7. Same - but Solomon tells the grandfather is living - Distribute B. acre as if "of the blood" was used in its feudal sense

Ans. Solomon takes

8. Solom. is dead but Humphry the G. grandfather is alive - distribute B. acre as if "of the blood was in the feudal sense - & distribute W. acre as if the word legal representatives were rightly placed —

Ans - Humphry takes B. acre, & W. acre is shared among Humphry Geo:, & the representatives of A, B, & C. —

9. Humphry is dead & Geo: is dead leaving 2 - Distribute B. acre as if of the blood is used in its feudal sense, & W. acre as if the word legal representatives were placed rightly.

Ans B. acre escheats & 2, D, E, F, G & H take W. acre per stirpes.

See Page 321

Of Escheats

In case of an intestate death & there be no heir to take the land reverts to the Lord in Eng. & to the Public here. The Lord takes the estate in fee simple. The Public here as not yet the Assembly may convey a fee simple & put the money in the treasury

Escheats are 1st From default of issue 2d When no issue but Bastards & 3d When a Monster

Aliens cannot inherit. If they purchase it only passes thro them to the Public. The Alien Law is here unsettled

If an alien has purchased & paid the money, & the purchase is consid void why would it not be just to suffer him to recover back or do the Public take pleasure in cheating strangers?

The Question is undetermined who are aliens? But one determine a man an alien & then the only question has the descent of the lands he has purchased been cast? If so it may continue to descend forever & aliens be capable of inheriting.

Mr Reeve has heard that in Westminster Hall it has been determined that these lands do not descend

320 Ther — Methods of acquiring property
1st by Deed 2d By Execution & 3 By devise —

— A Deed in Eny. is always a Sealed instrument, but a Sealed instrument not always a deed — A Deed is a Sealed instrument in which it is contrived to set the consideration behind the curtain, or where it is by no means certain what the consideration is In this case the action must be brot on the Deed —

In Connecticut sealing is not necessary and a writing is as Specialty or Deed wherever the consideration is removed behind the curtain In Engl. if the consid.n is expressed on the face of the deed an action may be founded on the original consid.n & the writing given in evidence But this is not strictly a deed — Receipts also are not here strictly deed — Whenever the deed is taken up & no man can learn from the face of it what the consider.n was it is then a Deed or Specialty

We are now going upon deeds as they respect the conveyance of land — This Law will not always apply to deeds of personal property

For a continuation see page 322

Distribution under the Com. Law of Eng.

1. A died seised of Real property acquired by purchase or descent no matter which He left issue A & B sons & C & D daughters
Ans. A the oldest son takes the whole —

2. Same only A is dead without issue
Ans. B takes

3. A & B are dead without issue
Ans. The daughters take equally —

4. A left a son C & Daughter F —
Ans. C takes —

5. Same, only A left F only
Ans. F takes

6. A & B are dead without issue & C & D are dead C left two daughters G & H & D left 3 daughters J J K.
Ans. They take per capita

7. Same only G was a son
Ans. G. takes alone 1/2 the estate is acquired by purchase

8. A left no issue ~~He~~ left his father Reuben his uncle Geo: & Brothers Sam, (who is the eldest & of the ½ blood) Tom, and sister Sally — and John & Susan Howe
Ans. Tom will take the whole — Reuben is excluded as it is a principle that Real property shall never ascend — Sam is excluded as heir of the ½ blood & John & Susan also Sally is excluded on the ground that females are not to take when there are males — For the whole subject see Williams

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Lec 26-94.

Of a Consideration in a Deed

1. There must be a consid^n expressed in the deed or one actually given - if the deed is destitute of both these, it conveys nothing

2. The consid^n must be good or valuable Money and Marriage are ~~good~~ valuable consid^ns these are the only good consid^ns against creditors. A good consid^n is love or natural affection but such consid^ns will not be sufficient to bar creditors of the grantor from attaching the land. Yet it has been decided that if a man has made a settlem^t on his son &c, & afterward was fully able to discharge his debts, but the creditors neglected to call for payment & suffered him to waste his property so that he finally became unable to satisfy them, they shall suffer the consequence of their negligence & shall not come upon the son -

on this subject See Coupe 705. 432

3. If there is a consideration expressed in the deed such deed will operate to convey the property whether it is true or not. The reason is not that a grant under seal as such is good without a consideration, but because the grantor cannot prove by parol testimony a fact contradictory to the writing

4. If this is the reason, a grant acknowledging a consideration & at the same time

detailing what it is, & it appears that it is in fact none, the ~~conveyance~~ deed would be good for nothing -

5. If the consideration is an illegal one, this may be always proved to destroy the operation of the writing - V^s the non existence of a consideration where one is acknowledged that cannot be proved - but on the ground of turpitude it may be impeached at any time

6. Tho it is true that the consid^n cannot be denied so as to prevent the transmission of the property - yet the sum expressed in the deed is not conclusive between the parties that that was in fact the sum given - It is no more than *prima facie* evidence - & if any cause requires an inquiry into the quantum, it shall be made as in a suit for damages on a covenant ~~for~~ warranty &c

7. Where the conveyance is only on a good consideration this tho' good between the parties may not be so as it respects 3^d persons interests therefore it may be enquired into whether the consideration was good or whether there was any -

8. Voluntary conveyances for a good consideration are not as such fraudulent - It is only presumptive, but this may be rebutted

9. A conveyance may be made to prevent creditors from taking the land & yet not be fraudulent as where there is other estate sufficient left —

10. When a conveyance is fraudulent it is good against the grantor his heirs &c but the right of creditors cannot be altered by the death of the grantor in what way then shall they avail themselves of the Estate — See a case in Dearnford treat the g- as ex^r de son tort see post page 333

11. The doctrine of fraudulent conveyances being good between the parties is not governed by the rules that govern other illegal transactions —

Lecture 27th July 3d 1794

Under the English Law Fraud is in all cases governed by different rules from what all other things are which are unlawful — If the fraud is in the consid^n the contract is nevertheless good at Law tho' the parties to the fraud be in pari delicto then the contract is wholly void — But in Equity tho the Fraud be in the consideration yet the contract is void & relief is granted — Immediately [illegible] and of the consid^n at Law void the contract — In Conveyances the Courts have said it covers a

Lecture 27 — Of Deeds of Land — 1794

At Com. Law, lands passed by Parole with the ceremony of delivery twig & turf. It became necessary afterwards that there should be deeds sealed — Originally every person or family had its private seal & were probably unable to write. Hence the substitute of the solemnity of sealing — But family seals were soon disused & any seal became sufficient — Afterwards Deeds sealed became absolutely necessary by Stat. Tho by this time civilization had proceeded so far that men wrote their names & all reason for sealing ceased. This business of sealing ridiculously extended to the present time & is in Eng. is indispensibly requisite — With us they have lost most of their virtue — But custom still preserves them in deeds of land — See Co. Lit. 231 —

There are a few instances where a covenant not, impliedly sealed may operate as if there are 3 signers & only one or 2 of them seal — 5 Co. 23 2 Lev. 220 2 T. R. 22 — If a seal is broken off by accident the Deed is in England void, unless it is in the protection of a Court — as if a protest is made of it & mice or should eat it off, it is then good —

Deeds of Land

When a grant is made & an exception provided for Sometimes the thing excepted will pass & sometimes not — At first sight the authorities may perhaps appear inconsistent but they are reconciled by attending to a rule of Mr Reeve —

Whenever the general term which would convey all that was granted is made use of & the thing excepted is mentioned by its appropriate term, the exception is good — As if a tract of Land is granted & a house standing on it is excepted the house will not pass — but the ground

But if the specific term is used & a part is carved out of that the exception is void As if I grant my house & shop excepting the shop — The shop will pass notwithstanding Or if I grant 20 acres of Land excepting one acre the exception is void —

A man grants all his estate at such place excepting a certain farm — & it appears that he owned no other property in that place, that farm will pass —

For this subject see 2 Roll Ab 45 & Hob 170

Co Ent 47 —

Of Deeds

Deeds must be delivered to be valid
No fixed rule can be laid down by which
we can determine what shall be a delivery
But when that is done which convinces a
rational mind that there was a delivery, it
shall be so construed —

If the grantee has the deed in posses
ion it is presumptive proof that there was
a delivery yet this presumption is liable
to be rebutted — Co. Lit. 36. 2 Roll 24 —

Of Escrows

Where a deed is delivered to a 3d person
to be delivered over to the grantee on the hap
pening of a certain event, it is called an
Escrow — On the happening of the contingency
the deed may be delivered by the stranger & is
operative from the first delivery —

If the 3d person misjudges of the fulfillment
of the condition & delivers over the deed when
it is not fulfilled the point may be litigated
& if ~~the~~ it finally appears that the condition
was not yet performed, the delivery will be
consid^{d} as a breach of trust & the grant posses
nothing 2 Brok 85 — C. Lit. 36. This condition may
be by parole — no writing is requisite —

Of Deeds of Lands

If a man delivers a deed saying if you do not on your part do such a thing then I declare that this my delivery is nothing at all yet the deed is good & the condition void Mr R. is of opinion that this is unreasonable This point has been litigated before our Courts & determined the deed to be good The court fell in with the current of Eng. authorities Those against this decision are More 697 Cro. Eliz. 835 On the other side Brak. Eliz. 520. 881. Hob. 24 9 Cok. 137

Deeds operate from delivery The date is presumptive evidence of the time of delivery, but this may be removed & the delivery proved to be at a subsequent or antedient time Yelv. 193. 2. Cok. 2 Roll. 21

Lecture 28th July 2d 1794

1. In common Deed of conveyance there are 2 covenants

1. That the grantor is lawfully seized of the land 2d He covenants to warrant the title against all their claimants

2. The grantor is liable to be sued upon either of these covenants

On the covenant of seizin the grantee need not wait till he has been evicted, but upon a

sonable conviction of the deficiency of the gran-
tor's title he may bring his suit. If this suit is
lost & the grantors title is found good, but the
g-tee is afterwards evicted he may bring anothe
suit against the g-tor on the covent. of warranty -
& the g-tor will be compelled to answer for dama-
ges as well as the original sum given for the land
When the writ of ejectment is brot against
the g-tee he must notify the g-tor of this that
he may come in & defend the title - The com-
mon way of notifying is by writ of voucher
in this state it is not absolutely necessary
If the g-tee neglects to notify, the title & legal
may be litigated between the g-tor & g-tee & if
the former is found to be good the g-tee must lose
his damages & if the title is good the g-tee has
his only remedy in a petition for a new trial
with the ejector

Of Quitclaim Deeds

These are attended with no warranty & if it
is a bargain of hazard the g-tee can have
no remedy against the g-tor tho the title is bad
but if the g-tee gives a full consideration for
the land & expects that there is no hazard in the

Dec 15 [illegible] P.

buying) but that he pays a substantial title he has his remedy against the g-tor for money had & received —

It is common to have subscribing witnesses to a deed. By the com. law this is unnecessary, but by our Stat. is absolutely necessary to the validity of a deed — There must be 2 — & if they are dead their hand writing is to be compared & if it appears to be theirs it is evidence that the deed was executed in their presence

As it is a maxim that the highest evidence the case will admit of must be introduced. Courts have determined that if proof is not produced why the subscribing witnesses are not brot in when a deed is challenged, other proof is inadmissible —

If the g-tor acknowledges the deed it is unnecessary that any other person should be called to establish it, as between g-tor & g-tee but as between the g-tee & 3d persons the law is otherwise —

If there are not 2 wit. tho the deed is good between g-tor & tee it is defective as to respect creditors. And the current of authorities establishes the principle that even voluntary grantees knowing such defect may take

a purchaser of [illegible] No Man [illegible] title
in fact can be [illegible] against the [illegible]
But in case of a [illegible] upon a [illegible] it is a
question whether other children can come in & take
advantage of the defect

& Deed must be recorded This was not the
case by the Com Law but made necessary here by
Stat. We have also a Stat. ordering deeds to be
acknowledged before a justice

& recorded
& Copy of a deed is admitted as evidence of its
execution tho this opens a wide door for fraud

In cases where there are no 3d persons concerned
& the pltees title is defective by delicacy of [illegible]
respect, Chancery will establish his title

When any person for fear of creditors de-
lays to put his deed on record the creditors may
upon conviction of the lands belonging to him
levy upon it & take it by execution, but in this
case the title would depend upon memory &
thus be defective But Chancery tho they cannot
give a title, will establish his upon their records
& this will furnish the highest evidence.
of "title"

Of Fraudulent conveyances

If a man convey away his land to a [illegible]
[illegible] consideration under its value & retain the
deed it is fraudulent & void as to creditors
good as between the & [illegible] & [illegible]

If Deeds of R. P.

This is the case with all conveyances which discover ~~fraud~~ an intention & collusion in the parties except here the g-tee has other property sufficient to discharge his debts In this case tho' it is manifest that the g-tee meant to keep that propy from Creditors they cannot take advantage of it—

This is not the case with personal property for that may be sold at the pleasure any time & turned into money while R. Propy cannot in this State—tho' in N.Y. it may—

If a creditor purchases an estate of a debtor in trust to secure his debt under its real value & to keep it from the hands of other creditors, he is liable not only to lose his purchased estate but also his own debt for it is just as fraudulent as if he never owed him not a farthing— The death of a debtor is never to affect the right of creditors as to his fraudulent conveyances 2 Vernon 587 & Salk In this case the Eng Courts have determined that the g-tee of such fraudulent conveyance shall be Exr is his own wrong & may be sued by the creditors—

But our Courts have determined

that after the estate has become insolvent & it is necessary to resort to such proof that the Covt. shall no longer be considd as a purchaser to the prejudice of the g-tee but at an agent of the creditors and as such may sue the g-tee in trust & may be sued in the creditors —

The title of the estate may be cleared ~~granted~~ conveyed may be considd as resting in the g-tee liable to the trusts in favor of the creditors shewing it to be a fraud —

Lecture 29. June 9 1794 —

The Law relating to fraudulent conveyances is different from that which regulates other illegal transactions — When the fraud is in the consideration & not in the execution such contract is valid as between the parties but if the fraud be in the execution, the case is different — for no Court of Law will permit any contract to be executed where there is fraud exercised in the execution — But in Chancery tho there be fraud in the consideration, yet the transaction is void & relief may be had — In mercantile transactions the fraud in the consideration, at Law ~~vitiates~~ the contract — In Com. the Ct have laid it down as a rule that where the fraud is a ~~total~~ fraud let it be in the consideration or execution

it shall be the same at Law as in Equity
This rule is not extended to cases where the grant
is only partial.

Of Alienation by Execution.

At Com. Law no execution could go against the
lands of a debtor except in the hands of the heir
for the paym.t of Specialty debts. The Executions
at Com. Law were 3. 2 or 3 Bl. Rep. 11

1. Levare Facias against goods & lands
2. Fieri Facias — against goods only &
3. A Capias ad satisfaciendum — ag.t the body

By the Lev. Fac. the lands were not delivered
to the creditor but only the emblements & pro-
fits, rents &c see Plowd. 441.

A Fieri Fac. went only against goods & Chat-
tles. Chattels ~~personal~~ artificial emblem.ts
are so far consid.d personal property as to be taken
on Fieri Facias. But the other profits are
not as grass &c 1 Salk 368. & Cok Rep. 171.
A Com for years may be taken by Fieri Facias.
& extended by heirs appraised of by 12 men
tote it has satisfied the debt.

The Capias ad satisfaciendum went against
the body only & that in the single instance alone
of a trespass vi et armis. This kind of execu-
tion has since been extended to all kinds of
accounts, debts, & actions on the case for debts.
This execution may be pursued till satisfaction
is obtained

Of Execution by Stat. Merch^t & Stat. Staple, & Ecpit

The Stat. Merch^t went against Lands & extended them for the payment of Merchants & no other debts. The Debtor must have gone before a Magistrate & acknowledged the debt. The Stat. Staple is much the same originally only permitted among traders.

Ecpit goes against all goods & ½ of the Lands of the debtor. The creditor may take any or all of the goods & have them prized off & sold & after these are gone he may go against ½ of the land & that will be extended.

Of Connecticut Executions

There go against the goods & land for want of them against the body of the debtor. If no goods Lands may be taken. It however goes against no lands but fee simple. Then they take 3 freeholders from the County. One appointed by the Creditor. one by the debtor & one by the Magistrate & the land is prized off & fee simple vested. All other kinds of Real Prop^y are daily extended by custom in this State tho there has been no adjudication of Court. That seems to be left as at Com. Law.

The whole of goods taken in Execution must lie out up 22 days before sale & carried &

Execution

at the post. Query. How can Emblements leases for years &c be brot to the post? The Stat. seems not to have contemplated this but it is apprehended to be left as at Com. Law. also rents due &c

No Choses in action can be taken in execution as bonds, accts &c

Cases where in Connec. we must resort to the Com. Law

1. To get an estate for life or in tail
2. To get Emblements & leases for years if they cannot be sold under our Stat. which requires them to be ~~sold~~ carried to the post
3. To get the rents yearly accruing on a lease.

Lecture 30th July 9th 1794

Of New York Executions

Real property is liable to be levied upon & sold at auction. It is bound from the time the judgmt is obtained, provided certain ceremonies are complied with. In Connecticut it is from the time the Creditor may at any time attach the estate & thus create a lien — There a creditor may take out execution against the Goods or the goods & land. In order to bind the land from the obtaining of the judgmt, the time & the giving

of the Judgment must be entered on the rolls
for before the execution must first look to goods
& chattels - for want of these lands may be
taken & sold -

Suppose the Creditor elects to take
the body & imprisons - the prisoner dies in jail
the Executor may sue out a new execution -
The Sheriff is bound only from the time
of the execution's being delivered to the Sheriff

Of Alienation by Devise

In general Real Propty did not be-
come devisable in name tho it did in fact
till the 32d of Henry 8. 1 the power to devise
was completed in Eliz. 2. But lands
were in reality devisable long before by means
of Uses. The inconveniencies of this practice
gave rise to the Stat. of Henry 8. which executed
the uses. i.e transferred the fee to the Use-man -
The Stat 34 of H. 8. mentions only tenants
in Fee tail & in fee simple - all Persons had
power might devise -

It became a question whether Propty able
Estates were devisable - By the former authori-
ties they were not - but by the later they
are 3 Lev. 427. 1 Black Rep. 222
At Com. Law an estate per autre vie might be
devised - but there was a Stat against that -

Of Devises —

Lecture 31st July 8th 1794

In Com. a devise vests the devisee with a defeasible title & such devisee takes whether the will be proved or not —

Any instrument for the disposition of property made in contemplation of death is a will be the form of it what it may — Finch 195 — 1 Vern. 117.

It must be signed by 3 witnesses —

If the instrument of conveyance be good as a deed the grantee takes beneficially as to creditors & they may find relief by application to chancery — treat him as exr de son tort — Or if the instrument be a will then the land may be sold for creditors by the Court of Probate Or if the instrument be neither will or deed the grantor or devisor dies intestate & the land is sold by the Chancellor for Creditors —

Wills may be made at different times on different papers they will stand as long as the different parts are consistent with each other — If inconsistent then the last alone is to be effectual Eliz. 721. 1 Vern. 187 —

A deed may be good which in itself is uncertain but depends upon another instrument to which it refers — Jac. 144. 1 P. Wms 5 3 Vern 20

Of Codicils

These do not destroy a former will—only by addition subtraction or by alteration. They are mere appendages

Requisites to a Will

These are the same in Eng. Com. & N.Y. They are governed by the Stat. of Car.

1. It must be written
2. Signed by the devisor, or by one by his desire & in his presence
3. Attested by 3 witnesses, and
4. Subscribed by them in the presence of the Devisor 2 Atk. 308.

It has been questioned whether a will of lands not lying in Eng. must be made accords to the laws of Eng. 2 P.Wms 291. It must— If a contract be made out of the State to be executed in the Loc loci where the contract was made shall not prevail, but if made generally not alluding to the execution any where in particular, then it will—

A man in his will may give a power to a 2d person to give certain land to 3 persons whom the 2d pleases— 1 P.Wms 740— This 2d person makes a will appointing these 3d persons— must the will be executed formally? It is only a power of Attorney & need not be disposed of by will

If a man gives money charged upon land, the will must be formally executed 2 Atk. 216-285—

Of Wills

It is customary in Eng. & Salop here to give the Ex^r a power to sell lands to pay debts — his must also be formally executed 2 Vesy 179. He need not go the Ct of Probate for liberty

Of Signing

Respecting this the Eng. law is our law for we adopted the Eng. Stat. after it had its construction — The will is good if signed by the Testator any where on the will — But if it be in proof that the Testator meant to sign it formally then the will is not good 3 Lev. 1. 3 P. Mod. 212 213 Doug. 241 — Stra. 764. 1 P.W. 313 — Sealing is not signing —

If the devisor say to the witness "I wrote this will you subscribe it? this is a good signing. The witnesses are called to attest to the sanity of the Testator 3 P.W. 93 & 33 — tho this presumption may be removed by other proof 2 Vesy 455 — The devisor says "this is my will" not saying it was his hand writing, yet the Ct held this a signing — Some authorities however are against this —

Lecture 32^d July 9^th 1794 —

The whole will must be present at the attestation —

The witnesses need not all subscribe at the same time — The 1^st wit. may

subscribe to the 1st sheet - the 2d to the 2d sheet & the 3d to a 3d sheet & yet the will be good 3d Bur. 1775 6 It is enough if the Test. be in the possible view of the witnesses when they subscribe Salk. 395 35 - 1st R. Cas. 99 199 - 1st P. Wms 239 or 292 Carth. 81

But if there is any fraud - as if the wit. subscribe without the privity consent or intention of the Testator tho' in his presence the whole business is a nullity 1 P. Wm. 740

A mental capacity is also understood by his presence Lee Doug. 240 Wright & Price

That a Will as executed in the presence of the testator is always to be proved But suppose all the witnesses dead then their hand writing is to be proved but that only proves that the wit. subscribed - In such case the Courts will presume that they did subscribe in the Testators presence & this presumption may be rebutted -

In Carth. 35 a case where 2 wit. signed the will & afterwards a codicil was made & subscribed by 2 wit. - the will was not good within the Stat. But if the Will & Codicil be on the same piece of paper the execution of the Codicil is the execution of the will - and also if there are several papers the last referring to the rest the execution of the last is that of the others -

Wills —

Trust The Wit. need not be together when they subscribe. see 2 Atk. 177.

There must be 3 credible Witnesses —

2d Ray. 505. A credible witness is one who is competent & one who could be improved as a witness if he had not subscribed —

Can non-credibility at the time of signing be purged by any ex post facto matter see 2 Atk. 1153 —

This question has been strongly litigated in Eq. & Com. In Eq. it has rec'd several decisions & the authorities are equally ballanced 6 Judges have decided one way & 6 the opposite — Lee C.J. B.R. against purging — Mansfield in favor

In Com. one case come up before the Sup. Ct & they determined that the Wit. might be purged — the Ct of Errors reversed their judgt — Since that another case has come before the Sup. Ct & they joined with the Ct of Errors — This went to the Ct of Errors agn & they turned from their former decision & reversed the judgt of the Sup. Ct again —

Lecture 33d July 10th 1794

What is a Publication?

Any act or declaration that imports a solemn intent of the Testator to have it a will — some act

Wills — Eng. 323

or words are necessary besides what the Stat says
For this subject See 3 Atk. 150. 8 Vines 125.

When the testator said to witnesses "take notice
with mentioning that it was a will they
were about to sign. This was determined a
subject Publication —

Who are excluded from devising.

On this subject it is not designed to include
wills made under duress &c which will apply to all persons generally — but other classes of persons
particularly specified by the Stat —

The 32d Henry 8th says "all persons having
lands may devise" — this aid, by no means,
mean to create a new power to persons pre-
viously disabled but only "that all persons
capable of devising in other cases, might devise
lands" — The 34 of H. 8. was made explanatory
of the former Stat. This has excluded — Feme Coverts
infants, idiots & all non-sane persons — The Stat
means "all natural persons" not bodies politic

Our Stat. has all the other exceptions
but "Feme coverts" — & declares that all persons
of right understandg, & of 21 years of age (not
otherwise legally incapable) may devise lands
&c — The question whether Feme coverts can

R.P. Wills

devise must depend then upon the Com Law— For the disposition of this subject See Mr Reeve's Essay

Lecture 34th July 11th 94

If a g-tor conveys land not his own & afterwards buys it, the conveyance is good as between him & g-tee— But if a bona fide purchaser after the g-tor's purchase has the land it will not operate— From this arose the principle that no land can be conveyed by devise but what the Testator possessed at the time he executed the will— 9 Mod 78

A Chancery will compelle any contract by which a Testator would acquire property he is considd as owning such property & it will pass under a devise 2 P.Wms 627. 1 Ves 421. 437 Such Equitable interests will pass under a descriptive clause as "all my Real Property" 2 P.Wms 629. This is a case where it would not pass at the Testator acquired it after the will executed—

A man may not only devise away his estate but may devise another a power to sell it— The Law on this point is well settled both as to real & personal property.

When one devises a man with intervening power of selling estate or doing what he thinks fit the Court of Chy will by means to give him no power if the

devise it a nullity. The fact is they cannot tell what the Testator means if he speaks in the vulgar language. But if he uses a technical term or any other extraordinary words which a man of common sense would not think of using evincive of his intention that the trustee should sell it, then the devise is good. One set of these extraordinary words determined by Ct to be sufficient is "to him to sell & give a title such as I could myself" This the Ct made out to understand. When the land is sold the money is in the trustee's hands to pay debts, & is in the same situation as the profits of an intestate. More 774.

But Stat has given the Exr the same power to sell as may be given by will in Eng.

Here when an estate is solvent or insolvent the profits will descend to the heir. yet when insolvent the heir is liable to their amount.

Suppose the Exr will not execute this power to sell. Chancery will order him to pay the debts if he is able or sell the land & if he is unable they will decree a sale.

But suppose he refuses to be Exr then Chancery are trustees & may execute the ~~this~~ trust.

If the Testator orders his land to be sold without naming a person to sell it. Chancery have determined the Exr to be the man.

Wills —

Where there is no Exr & Land is devised to be sold for the paymt of Debts the Ct. has determined the heir to be the trustee — 1 Lev. 304 —

Personal property coming to the hands of the Exr he may release, give away &c as he pleases but he is accountable for their value Real property however, he can't ~~do this with~~ devised to be sold manage in this manner — He does not sell as Exr but as trustee & if he should renounce his Executorship, still he may retain this trust.

When 2 Exrs are appointed & one dies the English Law is that the other cannot sell Lands devised to be sold — The reason of this is that they are trustees as to the selling of land, & the execution of their trust must be joint — One establish. they sell as Exrs & one may convey — When the land is more than suffict. to pay the debts, the Exr must pay the surplus of the mon. attained to the heir —

Lecture 35th July 12 — 34 —

Who may take by devise?

Coverture is no disqualification — Her taking however depends upon the pleasure of the husband This is the Com. Law But by application to Chy she may take in defiance of him —

Aliens are not capable of ~~but~~ holding estates by devise - yet he may hold till some proofs is brot against him & he is presumed an alien then the devise is lost & goes to the Public. It cannot however descend to heirs even if there has been no proofs against him & the heirs were born in the realm -

Bastards are capable of taking by devise a Nihil nullius If however the devise is "to a bastard son of such person" distinguished no other way, it is void for nothing - But if he is mentioned by his reputed name then he may take notwithstanding he is immediately after called a bastard - Elis 309 Co-Lit. 123-3

[illegible] there is a case of Moore where he took by being called his mothers bastard son but this has not been considered bad law See 1 Atk 410

In Tom Raym 82-83 there was a devise of a man to one of his daughters who should marry a Norton - One of them married a Norton & the heir endeavored to invalidate the devise on account of the uncertainty ~~whether~~ which daughter should marry, or that they might all marry Nortons - Yet the Ct determined that the first who married should take - This is a strong case to shew that an executory devise may be good notwithstanding it depends on an uncertain event

347 Wells Wills

A devise to a Child in ventre sa mère may be good — If the intention of the testator, independent of the words which give the estate, appears to be that he should take when born, the devise is good

Fern 428. Moore 177. 637. Cro. Eliz. 423 - 2 Salk 230
Roll Ab. 609. 1 Lev. 135 - 150 1 Vern 109

If the person is described so that there is no doubt the devise is good — as to the Clerk of the County &c, or the treasurer of such a State. Hob. 32 —

If a devise is made to a particular family the heir of the family takes —

Where such a man's posterity is devised to — if he has none his collaterals may take — "to one's nearest relations" all in the same degrees take if personal property, & if both real & pers. the Real shall follow the personal 1 Vern 335 — But if real alone it is not so yet this is apprehended to be the best way —

"To One & One's children" is also a good ~~word~~ terms to pass property in a devise — If at the time he has no children he will take the whole — if he has children they will take with him jointly 6 Rep. 17 —

"The testator's yet his intention might be frustrated entirely as to children he might mean heirs &c

"Heirs" of itself no word of purchase It only expresses the quantity of estate — it is not descriptio personæ

Of Revocations

Any time after making a Will the Testator may revoke it. The only difficulty is in knowing what is a revocation.

What would Damage to a Revocation of the person & property would be a Rev. of Real till the 29th of Car.

* Here we have no Stat respecting Revocations. It seems therefore that our Law is the Com. Law of Eng. Previous to the Stat of Car. Revocations by Com Law are express or implied. The former are written & parol. There is no particular solemnity required to revoke. Any solemn declaration written or parol indicative of the Testators intention to revoke is sufficient. Words in a Passion &c will not do. But if he call in witness & coolly tells them he revokes his will of such a Date or says "This is not my will it is a good revocation. Roll. Rep. Jac. 115. Car. 51. Eliz. 306.

Implied Revocations are also from writing or from words. A solemn declaration which if compared with the Will is found inconsistent with it is sufficient to destroy the Will as to that part which is inconsistent. As if a man had disinherited his heir in his will & afterward calls witnesses that his heir shall not be disinherited &c. 3 Wills. 511.

Stat 29 Car. had reference to express & not implied Revocations.

* as the Stat. of Hen. 8 did not require any (and therefore no actions to revoke) implied the Stat of Car. 4 Inst. 80. Jones 118. Mr Powell, Lyttleton Hard. 469. See page 432 of Wills No 3

Wills

The existence of a 2d Will inconsistent with the former is a Rev. 3 Mod. 203 Comp. 87. 2 Salk 592 3 Wills 497. 7th B. P. C. The former cap.

A Codicil also if inconsistent with a former will is a Revocation to the extent only of that wherein the Codicil differs

Lecture 36th July 11th 91

A subsequent different will or Codicil if made upon a false impression in point of fact is no revocation but if it is false in point of law it is a revocation tho' the devisor's idea respecting the law is a mistaken idea — Where a 2d will is made so that it is an implied revocation of that 2d will is destroyed, cancelled &c it is a setting up the first Will 1 Burr. 2512 — If the 2d will contain a clause of Revocation expressly & then is cancelled & the 1st will is found entire, yet it is no Revocation Bulty it had not been a will the judge would it should have the revocation as a dead &c or if the 1st had been cancelled the cancelling of the 2d whether in that 2d there is a revoking clause or not, the first will is revoked — Comp. 49-53. — Any act incidental of a design in the testator with words or writing as the cancelling, tearing, he will animo revocandi is a revocation —

An alteration of the Testators circumstances is also a Revocation. A Marriage & afterwards issue born. Marriage & issue however are only presumptive evidence that the testator would not have his will stand & testimony is admitted to rebut such presumption. If after all the wife & issue are provided for it will not be a revocation as perhaps a part of his estate is given away & enough is still left for his family 1 Ppm 304. in note - 1 Bro. 2182 - Doug. 35. 38

A feme makes a will & marries. This is a revocation as to the personalty, as the personalty will operate as a disposition in her husband - as to the Realty the will is suspended - So that if she died during coverture before her husband the will would not operate, yet if she survives she recovers the will is good 1 Rep. 61. 1 Ld Raym. 313. The reason of this doctrine is that prevents her making a will. The total change in her circumstances are such that it is more than probable she would not wish to have the first will stand -

The will of a person who becomes non compos still remains his will 1 Vt Rep. 61 -

An actual alteration of the estate of

Wills

Question by the Ct.

the devisor is a revoc^{n}. The Rule is not whether he intended a Revoc^{n} or not but whether he intended an alteration in the estate if he did it is ~~an alteration~~ a Revoc^{n} as if a man should devise & then enfeoff another to his use or if A aliener notwithstanding then repurchases it is a Revoc^{n} 1 Roll. 615. 1 Atk. 578

Before these last instances the true intention of the Testator was the leading rule But in these cases that has nothing to do with the business—

A Tenant in tail made a will & then suffered a recovery on purpose to give effect to his will still this was a Revoc^{n} 2 Ld. Ray. 1083.

Even if he was in fact seised in fee & revised & apprehended that it was an entailed estate & should dock the supposed entail on purpose to give his will effect it is a Revoc^{n} 3 Atk 803.

The rule is the same in equitable interests only. A man having an equitable interest devises it & then takes a legal conveyance, This is no revoc^{n} 1 Wils 311

But to alien a legal into an equitable estate would be a revocat^{n} after a devise Mere Partition is no revoc^{n} 1 Ray 1240.

for only an actual alienation of the estate

but an intended one, which fails thro some defect in the conveyance, is a revoc[n] as in Popham 108. where a devise was made & afterwards a feoffm[t] of the Land of which there was no livery — This was ~~not~~ a Revoc[n] p[r] L[d] Judge Blackstone Rep. 3. 19. Bolle 615.

These cases as we have seen depend upon the test[rs] intent to alter the estate & if there was none, then it is no revocation as where A. devised to B. & then enfeoffed C to his own use for life & there was no livery He asked if it would destroy his will & was informed it would not — In this case there was positive proof that he meant not to alter the estate so as to injure his will — whereas in the other instances the law presumed he meant to revoke by the alteration — A man devises to a corporation which cannot take — This is a revoc[n] as it shows his intention to alter the estate —

3 Atk. 72 — 1 Ld. R. P. C. 405. 9 Mod. 190 — Lecture 37th — Anon Dom. 1791 July 15

A man must be seised title death for if disseised it is a revocation But if the disseisin is thro' covin it will not be a revoc[n] 1 Roll Ab. 378.

If the Testat[r] is disseised at the time he devises & afterwards reenters it is no revocation

Wills

Land revised & then re-ped the re-pe is a revocation pro tanto - and if re-ped to the revise a revoc^n ~~in toto~~ - 1 Salk 158 - 2 Wk 748 - 2 Lo Raym 968 - This an exception to the rule laid down before respecting alteration of the estate -

- Where a man devised his estate & afterwards for a particular purpose has sold it - to raise mony for instt. to pay a Debt, or if he gives ~~in his will~~ a power of disposing of his estate to satisfy the debt - this only a revoc^n pro tanto 2 Wk 272 -

Where an estate is devised in fee simple & a smaller estate is carved out of this it is a revoc^n pro tanto - As where a lease is made after the devise in fee simple Roll 616 - 18 Jac. 49 -

The above revocations are by com. Law The English Stat left the Com. Law as it respects implied revocations as it was - ~~Where~~ ~~in Virginia & the Com Law introduced~~

By an Eng. Stat - which prevails in most of the States - no expreſs revocation shall be good unless by a subsequent devise or codicil, or a writing expressive of this desire to revoke signed & attested in the presence of 3 witnesses -

A subsequent revoking Will must be a good disposing Will, or it will not revoke the first but a writing indicative of the Testators intention to revoke with one solemnity viz of signing in the presence of 3 witnesses, is a good revoking instrument provided there is no disposition of property in it - yet if a man will make a will & it is defective as to passing the property devised & in the same will [illegible] a revoking clause it shall have no effect 2 Mod. 258. 1 Wm. 243

Tearing Burning & obliterating the Will by the Testator or by his request animo revocandi are revocations Carth. 81 — See Comyn. 52 1 Ld Wms 316 - 2 J. Black Rep. 1043

Parole express revocations in Com. are good tho not in Eng — Mr Reeves opinion

Lecture 38 - July 16. D. 1794

Of Republication of Wills

Republications are express or implied

Of express these must be in writing that they cannot be by parol is no doubt — Com. Dig. requires that they should have all the solemnities requisite to a Will to be good republications

The general received opinion is that a parol republication done with a serious intent is sufficient but this dear is most evidently false

Wills

Of implied Republications — When there has been a subsequent Will revoking a first & this 2d is destroyed with a design in the Testator to destroy then the 1st is republished by implication.

A Codicil also executed according to the Stat. relating to a Will is a republication impliedly 3 Atk. 780. 9 Mod. 68. 78. 1 Vern. 13. 185. On a Republication the Will speaks as a new Will just made — And if the Devisor made a Will & afterwards purchases other property than what he first devised & the terms of the first Will will embrace this after purchased estate, it will pass by a Republication — As if one devised "all his Real Property" & after such devise acquired other Real prop. — a number of years afterwards he republishes the Will all the real prop. he owned at the time of Republication will pass — 1 P. Wms. 275 But if the Will cannot embrace the after purchased estate it will not pass as if Black acre & White acre were devised & he afterwards purchased blue acre. Blue acre cannot pass by a Republication because it is not embraced by the Will —

Parol Averments

Prior declarations of the Testator to shew what he meant when used give an import to the language of the Will different

from the natural import are inadmissible
5 Resp. 68. 2 Atk. 216-379 Plow'd. 345

But averments of facts to give direction to a devise consistent with a will are admissible as where a man had 2 sons of the same name proof was admitted to shew which the Testator meant &c — Or where there were 2 farms of the same name — 8 Resp. 155. 5. 68 — 2 P Wms 137.

A Rule to be observed respecting the averment of facts is — "If the uncertainty who or what was meant arises from the face of the Will no parol proof to explain it admissible But if it grows dehors the will it may be admitted As a devise to A. B. — Then was a Father & a Son of that name 6 Mod. 199 1 Atk. 411. 2 Vesy 216

Parol proof is admissible to shew what was meant where these words of equivocal import so that an ambiguity is created by the use of them Moore 185. as where son is used for grandson &c &c

In a grant if a man's name is mistaken altho the description be complete it is no conveyance but in a Will the law is otherwise 1 Atk 410 2 Atk 240 — 2 Vesy 216 — 1 P Wms 136. 3 Wm. 187.

Lecture 39. July 17 — D 1791

Whenever words are used which have a certain & fixed meaning, let this be ever so clear on the face of the Will parol proof circumstances may be offered to prove that the Testator meant by

Wills

must necessarily have meant differently as in case of a devise "of all my estate my debts being paid" the technical meaning of which is "all my personal estate" & that it meant personal property only ~~& in such case only as estates for life~~ but proof by parol was admitted to shew that the circumstances of the Test.r ~~were evidence~~ would not admit of such legal construction as the personal estate was worth only 10£ & the debts amounted to 100£ It was therefore manifest that the testator meant to devise a fee simple & the devisee was allowed to take accordingly — 6 Rep. 16

If a man has child & a devise is made "to him and his childn" the childn would take with him but if he had no childn it would be a word of inheritance & consid.d as "to him & heirs" parol proof is admitted to shew whether he had or had not childn.

In Salk 234 there is a good case for this purpose. It has settled the law that such external circumstances might appear in order to shew the intention of the Test.r

Where the words used are not technical & no ambiguity on the face of the will yet if the state of the test.tor's prop.y would not admit of such a disposition as

would appear from the terms used, circumstances may be let in to prove such inconsistency — See a good case in 1 Brown Can. Cases 472

~~To warrant to prove 1st~~

~~1st That the~~ are admitted

Parol averments 1st where the meaning is equivocal — 2. Where from the will ~~only~~ it appears that only a life estate is intended, to prove that a fee simple was in fact meant 3. To shew the circumstances of a man's family as whether he has children or not when the terms are "to him & his children" 4. Where on the face of the will there arises no ambiguity, to prove that the circumstances of the Testr's property are inconsistt with the disposition &c. 5. To rebut an Equity or an proposition of law or ~~court~~ an implication of law which means the same thing — This last happens only where there is a difference between the regulations of Law & Chancery — As where, no legacy to the Exr he will take the residuum, but if there is Chancery have determined that he shall not have the residuum ~~to prove it~~ admitted, to rebut ~~the~~ construction of ~~it~~ in favour of the next of kin" this equity & shew that the Testr meant the Exr should take the residuum 2 Ves. 201 — this receive the old legal construction

If a man owed another a sum & gave him a legacy the law was formerly that the legacy should go to extinguish the debt — This Chancery

Wills

considered an implication of law but proof was admissible to shew that the testatr meant differently — 2 Ld Ray. 1324 — 1 Vesy 323

May not such cases come under the head of Equivocal expressions? They might with propriety with a recurring to the latitude expressions of "rebutting an equity" ~~&c &c~~

Lecture 40 July 18. 1794

Of Injuries to Real Property and their Remedies —

Of Trespass vi et armis &c. R. Prop.

This is any invasion upon the property of a man Leases the Personal Prop. fall under this subject

The remedy is the action of vi et armis which is founded upon the possession of the Plf. (right to bring this action) It is not necessary that he be the actual owner A Lessee or disseisor is entitled to this action Whoever brings such action must either be owner of the prop. or have some color of ownership otherwise In Eng. to entitle a man to this action he must have entered & thus be in actual possession of the land Here no entry necessary as a man is in actual possession here as soon as he has purchased an estate whether he has

if no person is in ~~the Country~~ entered or not. If the Pff has been dispossessed he must have purged the disseisin by entry - & in Eng. if a man has a right merely, as by descent without entry he is not entitled to the action - In personal prop. the ~~case~~ case is different, ~~as that is in Eng as in the Same footing~~ Both here in Eng. the law is that whoever has a right to personal estate is consid as in actual possession.

It may be that the owner cannot have this action as if he has leased or been dispossessed. In case of a lease the owner is consid as a stranger & should he enter an action of ~~Trespass~~ would lie against - this rule will apply to leases for life & for years but not perfectly to a lease at will - In such case the owner may enter when he pleases yet if he injures such property as the lessee has a right to, as emblements he is a ~~trespasser for the term~~ -

When the intrusion is an injury to the inheritance itself the Lessor is entitled to this remedy & he has his election whether to bring it against the lessee or trespasser - The lessee may bring the action if he pleases against ~~the~~ Trespasser, ~~on~~ the ground of his liability to the Lessor - & he that institutes his action first cuts the others right of action. But the Lessor

Injur. to Real Prop'y.

can in no instance bring the action where there has been no injury to the inheritance — The Lessee for life or years is never liable to this action, tho he may be in another kind of action as Waste — The tenant at will is however liable to this action for injuring the inheritance — Co. Lit. 57. 1 Roll. Abr. 860 2 Bac. 551 2 &c

A disseisee may bring his action against the Disseisor for the act of disseisin, but not for subsequent waste till he has regained possession — then he may maintain this action for the whole time either against the Disseisor, Lessee, grantee &c. But the authorities on this point are contradictory — 2 Roll. 553 2 Roll. 553 Wheeler 51

If a man has sold his land on which there was a trespass, he may have his action against the trespasser after the sale —

Where land is cultivated on shares the owner alone is entitled to the action — Mr. Hall has civil actions in the name of both the owner & cultivator on shares, & has sustained them in this country — jointly

Where there is a reservation of certain trees in the sale & the Lessee cuts those down & on all other similar cases the Lessor may bring his action against the Lessee —

A man is liable for trespass by his cattle & the form of the action is that he entered with his cattle &c — If the fault was in the fence of the owner of the land the owner of the cattle may take them out if the fault was in his fence, by entering he subjects himself to another action of Trespass.

A man may have a legal warrant to enter a house & he may in some cases enter without a legal warrant & not subject himself to this action — as if felony is about to be committed —

If one goes across land without the licence of the owner he is liable to this action & does damage —

Where a trespass is committed upon the land of the wife — if that only alone is injured to which the husband has a right he need not join her in the action — but if the inheritance is affected she must be joined —

The master is liable for a trespass of his servt if done in the pursuit of the masters business tho without his orders. ~~tho~~

It is apprehended that the ~~Ct~~ will yet ~~know~~ hold that the servt must in all cases be joined with the master where the servt is not alone liable —

Com. Stat. of Trespass

& Tender for an involuntary trespass if a sufficient compensation in the opinion of the Ct is a good bar to an action —

Lecture 41 July 19 — D. 1794 —

Of the Connecticut Stat of trespass as altered from the Com Law

The action must be grounded upon the Stat. otherwise it will be presumed that he takes his remedy at Com Law This Stat operates upon none but voluntary trespassers & not the Stat.

If the action is brot on the Statute which give 3fold damages, & there is not proof sufficient to convict a man on that stat the Ct may give Com Law damages which are only single yet with — ing substituting a new suit

Courts have adopted this rule That where a statute is a remedy both by Stat & Com law if the action is founded on the Stat & there is not proof sufficient to entitle the Pl to a recovery on that, yet if he could recover any thing at Com Law they will give that damage to him without putting him to the trouble of bringing a new suit —

The Stat. has provided that if there is any doubt of the Offs being guilty the Off may swear that he suspects him

& the Pft must then either swear that he did or did not commit the fact. If that he did not he is clear unless the Pff has other proof besides his suspicion — This is directly against the principles of the Com Law & seems directly to hold out a premium to a man in this situation to commit perjury — The Pff in such case is not to be examined as to the ground of his suspicion — If in an action of Trespass the Dft claims to own the land the mode of proceeding is for the Dft to enter into a bond of 20£ that he will pursue his plea to defend his title before the County Court or bring an action of ejectment against the Pff — The practice is for the record of the justices Ct to be taken up to the County Ct & there the Dft may pursue his plea. The case then goes on just as it would before the justices if he had power to try the title — This trial of title will be a bar to any action of Ejectment.

Of an Officer's power to break Doors.

The General rule is that if the process is criminal he doors may be broken but in Civil cases outer doors & windows cannot be lawfully broken down — The House of every man is an Asylum or Castle for no man but the owner of the house & his family

Of Officers breaking Doors

If the outer door is entered peaceably all inner doors may be broken. The reason of this law is that in populous places Thieves might take advantage of a man's house being broken open & not know of his goods & frighten the family &c. See 5 Cok. 91 Comyns Digest Tit. & Bro. Abr. 908.

After the Officer has illegally broken in it has been a much litigated question whether a Levy is lawful. See the above cases. It has been determined here & in Eng. that such Levy would be void & the officer liable in trespass. But the reason & policy of this is now questionable for this is directly encouraging a violation of law. There is a case where a man was arrested in presence of the Ct which was a contempt of Ct he being in their protection yet the Ct said the Levy was good & the Officer liable for this contempt.

Lecture 42 July 21. 1794

Of forcible Entry

Formerly if a man had a real or personal right to land he might enter & resist it from an intruder by force. This practice disturbed the peace of Society. Hence Statutes were made to stop such violence. In personal property force is to be used only where by neglecting to use it a man would lose his remedy.

As the Law now stands a man must not enter by force (i.e. strong hand) nor with a number of persons with a view to take possession. It is equally criminal in this point of view whether the person that enters is the actual owner or not.

The Rule is that no person shall enter with actual violence, nor with so many persons as to create terror either of these would be a forcible entry. In both cases they must come with a design to enter & oust the present occupier. The offender is then liable to be indicted & punished. See Hawk. P. C.

Forcible Detainer

1st This is where one has made a forcible entry & detains forcibly. This is criminal whether he has title or not.

2. Where one has got possession without force & detains it with force against the true owner.

There may be a forcible detainer & forcible entry at the same moment. As where one ~~detains forcibly, & the true owner~~ is in possession unlawfully & the owner enters, & the intruder repels with force. It is criminal in both the owner & intruder.

Where the intruder is turned out by the forcible entry of the owner, & brings his suit against the owner for forcible damage, although it was a crime in the owner, yet the intruder shall not recover damages for ~~his~~ property has not been injured. but it is a crime punishable by the Public

Forcible entry

yet in such cases the Law has furnished a eccentric remedy - he may complain to a Justice who may cause them to be repaired the ~~entry~~ is to be made by 18 freeholders — Here the Question of title does not come up. The only fact to be enquired into is the forcible entry — The same in a forcible detainer; if there was a forcible entry also But if there was only a forcible detainer, the Ct may punish, but not cause the other party to be seised —

Of Waste

All tenants for life whether conventional or by operation of Law are liable for waste & all other tenants for years &c are liable for waste —

For the com. Law waste, single damages only could be recovered but by Stat treble may be —

Waste may be committed in Houses, meadows & all other lands — Co Lit. 53

If the house is suffered to lie unconvered an unreasonable time, it is waste in the tenant — If the prop^y was in a ruinous state when taken it need not be kept any better 2 Roll 818 It is waste for a man to extend a house & make it more valuable, to change plough-land into meadow 2 Roll. 815. Co. Lit 53 Cro. Jac. 182 - 1 Mod. 94. As a general rule it is waste

to alter the situation of the Premises — One exception to this rule is where pasture was improved into arable land — The judge observed it was not waste for this plain reason It made the land better — 2 Roll R 814 —

Lecture 23 July 22d 1791 —

Every thing that is considd waste in Eng is not waste here — In this country wood & timber cut in such a manner as to injure the farm would be waste As the cutting down chestnut groves without leaving sufficient for fences &c — It is waste to open new mines or dig gravel &c but not to improve old mines — Every mismanagement is not waste as to suffer meadows to be overflowed &c Unless it is otherwise provided in the Lease the Tent must repair houses, fences &c at his own expence He may however take timber for necessary repairs from the land Co. Lit. 53 —

If in the Lease the timber is excepted he has no right to take even for necessary repairs but by taking it is guilty of Trespass as any other person — If the term "without impeachment of waste" is used, the tent is not liable for ordinary waste — but he is liable for all wanton waste such as an owner would not commit — In such cases Chancery will interfere & grant the Lessor a proper recompence or grant an in-

Waste

Dy 8 Green Wood Tit Roll 820 822

injunction to stay waste—

If the injury ~~Lessee~~ it thro' his the Ten^ts own fault he can't take the timber to repair Co. Lit. 54 —— The immediate reversioner is the only person to bring the action of waste

An action lies against the Ex^r for waste during his adm^n tho not for that done in the life of the Test^r Eliz. 683-2 Roll. 828—

If the Lessor brings his action against him who commits the waste, he can't bring his action against the Lessee, or an assignee of the term—tho he has his election which to sue—A Ten^t having land prized to him for a term to discharge a debt, is not liable to an action of waste, but must account for all damages, & the same principles is brought to extend to mines——

Eliz 771. Of waste as in Chancery——

Where waste is committing we have seen Chancery will grant an injunction where an action of waste would lie & in many instances where this action would not lie—A Trustee who has at Law the inheritance may be restrained—& also a Ten^t in tail after possibility of issue extinct—This is where the waste is wanton & malicious. Whoever has even a contingent right in fee may obtain an injunction. Hen 555-524-546

See 1 Wm. 528. 3 Salk 216. 2 Bac. Ab. 89
These authorities show the extent of the term
viz. impeachment of waste

Of Nuisances

For a public nuisance no action will lie for the general inconvenience but if any one has sustained any particular damage he has his action — Public nuisances are punishable by Stat.

For Private nuisances actions are brot on this subject see Black. Comment. Actions may be perpetually brot & recovery had till the nuisance is removed

Building tan works & stables so as to disturb or discommode neighbors have been decided nuisances

Lecture 44th July 23 1794

Of the action of Ejectment

This is the only action now brot in England for the trial of title to lands — At first it was only used to recover a term for years but by a course of fictions they have got to try the title for the Exploit Law on this subject see 3 Wooddeson 42 where it is briefly & plainly laid down — or 3 Black. Comm. Auth. cit. Car. 492 — 1 2 Ray 741 Cont. 217 — 2 Bac 669

Con. writ of ejectment

In writs of ejectment we have no fiction. It may here as in Eng. be brot to recover a fee, life or a term of years.

Our Law makes no difference between a right of title & a right of entry as in Eng. but whoever has a title has of consequence the right of entry & is considered as actually possessed unless he is disseised & disseisee has the right of entry which cannot be taken away by Stat. the disseisor having remained in an undisturbed possession 15 years.

This stat. has been construed to take away the right & property as well as the right of entry. But Mr Reeve justly rejects this a false construction.

The Pff must state that he was in possession within 15 years last past, that he was disseised &c & he must also describe the land. If judgt is in the Pffs favor, the Sheriff must put whoever may be in possession & replace the Pff. An execution for mesne profits in such case cannot be had in this State for in the assessment they take these into consideration. If the Pff dies after judgt but before execution the heir has his action for the Real property & the Exr for damages.

Lecture 43. Feb 24 - 1791

1. Of Slander.

There are 2 kinds of Slander Cognizable

1. Where words are actionable in themselves
2. Where there is damage in consequence of Words

Of the first kind ~~How are general~~ cases

In this kind of slander it is immaterial whether any particular injury follows in consequence of the words, but from the evil nature & tendency of the words themselves the presumption is that the person of whom they were spoken has received some injury. It must be stated in the declaration that they were falsely & maliciously spoken & if there was any damage it may be stated, tho' this need not be done.

In this first kind of Slander where the words must be actionable in themselves, there are several cases —

1. All words charging one with a crime which if true would subject him to corporal punishment are actionable —

as if he was charged with stealing the only question is whether stealing would subject to corporal punishment if so then actionable But if charged with being a liar — Will this subject to punishment? No — Then not actionable

Of Slander

In Com. a man guilty of adultery is punishable & if charged with this he is entitled to his action - But in Eng. it is not punishable - consequently not actionable - In both Countries the same principles govern

2. Words which affect a man directly in his business are also actionable As to charge a Physician of being a Quack but if of being a knave no action lies - for those who employ Physicians do not enquire nor care whether a man is a knave - The only question is whether he is skilful - But if a Lawyer is charged with being a knave this affects him directly in his business & is therefore actle If a Blacksmith is accused of shewing horses badly he may have his action, but not if charged with being a knave &c or of making bad Saddles for these do not affect him in his line of business —

3. Such as affect a man in his office ~~in a just~~ with reference to him in his office as if a Justice if accused of bribery or any things said which affects his understanding or integrity with reference to any particular decision of his —

2 Mod. 177. 1 Ventr. 168 There is some contradiction in the authorities respecting the actionability of slanderous words spoken of a man with reference to him in his office but the current of the authorities are that they are all actionable

1. Where one is charged with a disease which ~~if true~~ would banish him from society as Leprosy formerly &c

"But it is not certain that the Pff may recover by proving that these charges were made. It must appear that they were false or no recovery is had — it is necessary also that they be spoken with malice. — This legal malice is not exactly the same with malice as commonly defined. In law it means any thing spoken from an unjustifiable, wicked, unsocial motive. — So that if it turns out that the words were false, yet if the Pff makes it appear that his motives were pure, there can be no recovery. If spoken thro carelessness the motive is not pure — but it is legal malice — No cases have been decided against these principles —

(They will be taken false unless the Pff proves to the contrary)

With regard to trespass sometimes a charge of this kind will furnish a ground for an action & sometimes not. This rule is drawn from the cases in the Books.

"Whenever the trespass with which he is charged would impair his reputation the words are actionable — but if his reputation is not affected, not actionable —

As if one is charged with throwing ballast off New H. wharf — This would not impair his rep. & not actionable but throwing it charged with stealing goods

Of Slander

Of the 2d kind of Slander. Viz. Where damages have been sustained in consequence of the charge —

The charge must be stated in the decl^n to be false, & the damage must be stated — It is yet an unsettled question whether the words must be spoken maliciously — The current of authorities are that they must be maliciously spoken —

The Plf may be admitted to prove other words besides those stated in the declaration, unless those words are actionable in themselves as if one is charged with theft the Plf may prove that he called him "a thief" or that "he stole money" but not that he accused him of being guilty of perjury for he has a separate action for the latter charge — but one of those phrases is stated in the decl^n

If the words are spoken in Jest it is never a justification but where there was a just provocation damages will be mitigated — If there is no provocation the circumstance of their being spoken in jest will rather enhance than mitigate damage for the law, tho it casts a veil over the frailties, gives no guarantee to the vices of mankind —

The manner in which the words are spoken it is not a test — They cannot be evaded by being thrown into the form

of conjecture &c as some have supposed—

Words spoken of a man's evil inclination are not actionable— He must be charged with some vile act— Hut. 2-18— 2 Wils. 300 1 Roll. 78. 1 Str. 142—

There is another rule— That if the words are spoken ever so maliciously, yet if the Plf can't be punished no action lies as if a man is charged with having killed his wife— But the wife was found to be alive— so that the man's character could not be injured & he could not be subjected to punishment Lee 2 Durnf. 173

Lecture 40— July 28. 1794—

Where special dam. is stated in the Decl. it must be proved— So say if a Clergyman that he is an heretic is not ple. when the only spec. dam. is the consequent discredit—

In the case in Bro. Eliz. 289. That is a charge against a man immediately affecting his business but no spec. dam. proved yet the action was sustained Salk 694. 2 Lev. 70 Cro. Jac. 82 Contra a bastard, ultimately this no spec. dam. proved

Charges actionable in their nature are to be so when used in the legal courts of proceedings But if used before a Court not having Cognizance it is no excuse— they are actionable— Eliz. 230—

~~There~~ There is no such thing as verbal slander— each one must be taken separately—

Handsome words are not to be taken in the mildest or in the severest sense but according to common acceptation—

Slander —

Parol Slander is not consid.d a crime here or in England by Com. Law. But by our Stat. it is —

Of Libels or Written Slander

Whatever is Parol Slander would be Slander if reduced to writing & many other words which wound the feelings, injure the honor &c tho these words not be Slander unless written — Pop. 139. Hob. 215. 2 Wils 403. Whatever tends to disturb the peace of a family is a libel 2 Mun. 980.

So far as the Libel respects the person against whom it is written, the truth of the charge is a justification but it is a crime against the Public & punishable — 5 Rep. 125. Some Libels are pardonable, but not actionable as a Libel against a dead person, or against government or its administration 6 Cowp. 6 & 2 — whether true or false

Publications of obscene books was consid.d a libel 2 Str. 788. or against the established religion 3 Str. 834 2 Durnf 196 —

An action was brot in this State for a publication against the Christian religion but the Court would not permit it to be litigated.

L.d Mansfield determined that the jury should only say whether the fact of its being published is true or not & not to tell what the Law is arising upon the

by giving a general verdict — Libel attended by Malice in Law
facts — He has been censured for this decision, but Mr Reeve thinks unjustly — for it has been long a principle that the jury are not to decide upon the Law unless where the law is blended with the facts

There are 3 defences to this action
1st A demurrer — where the Deft acknowleges the facts stated in the declaration, but denies their actionability —
2. A special Plea in bar — where the facts are admitted by the Deft & he says the charge was true, & in this state the truth is a justification
3. General issue — not guilty —

Under our Law we can prove the fact under the general issue is plead — See our Stat —

Lecture 17. July 26. 1792

Of the Pleadings in an action of Slander

First it is customary to state the excellence of the Plffs character — but this is unnecessary —
2. That the Deft spoke certain words "false, feigned & scandalous" — The first of these viz. "false" is an essential allegation — The decr would be ill with[out] it — but the other two are not essential — It ought always to appear from the face of the decr that the Plff is entitled to a recovery —

Slander

3. The words must be stated to have been spoken maliciously - This is also a material allegation —

4. That the words were spoken "in the hearing of divers citizens of this State"

5. If the words were spoken with reference to a precedent conversation & the words he or you are used - as ~~you~~ are a perjured villain - or he a thief - It is common to include ~~it~~ within a parenthesis ~~who~~ was ~~but is~~ meant - as he (meaning John Roe) is a villain a thief &c - This innuendo is not to explain any term used, or extend its meaning beyond its natural import, but only shew to whom or what they apply. 1 Wh. 3 v.

6. Then state the dam. either generl or spec. as the case may require - If you state special dam - the story must be told concisely - If the Decn is for words affecting a man in his business it must be stated that the Plf was in such a trade —

Against a Magistrate it must be stated that the words were spoken with reference to him in his office —

7. If it was for a Libel, it must be stated that the words &c were published of & concerning the Plff &c —

Of the Defences

See page 378 for the 3 general defences

1. That the words were spoken in the course of legal proceedings is a bar. Jac. 91.

5. A recovery of damages in a former suit is a good bar. The circumstances must be related particularly, the record &c &c

6. Accord & satisfaction is a good plea

after accord the Plff need not accept but may go on with the suit this appears unreasonable. It must appear that there was an actual reception & the satisfaction must be valuable 2 Rep. 96.

7. The Stat. of Limitations is a good plea. The time in Eng. is 2 years & in Con. 3 years. The stat. extends only to words actionable in themselves, not to actions for special damage.

8. A written Release

9. An award. It must be stated that there was a submission & award. It is no bar however unless the Dft has complied with it. If the award was to be performed before the action brot it must be so stated. If this plea is made after the award was to be performed, the award must have been complied with. If there are 2 sets of words, one actionable & the other not & the jury bring in a general ver-

Hander

dict of "guilty" It may be arrested — 1 Rep. 130 - See a case in Cowp. — In such case the Dft might demur to the part not actionable & plead the gen. issue to the actionable part —

Lecture 48. July 28 1784 —

Of an action on the case for a malicious civil suit —

As a general rule, that no action lies, unless one has suffered damage, & has a ground of action whatever the Plf in the original suit failed 1 Ld 13. But there are exceptions

1st If the Plf knew he had no ground when he took the original suit This action lies 1 Rob. 260. 266

2. If he sues so as to hold the Dft to excessive Bail This action lies, in such case the Plf had a ground of action but the malice in suing the Dft as a ground of action As if an attachment is issued for a vast deal more than is due to the Plf & Dft is unable to find bail for so large a sum 1 Sid. 424 - 1 Saund. 228.

3. Where one sues another before a Court having no cognizance of the cause It must appear that the Plf knew the Court had no cognizance - 3 Wils. 302

4. Where one fraudulently procures a judgment against another without giving notice as if the Plf continues to have the

ficer leave a copy so as to deceive the Deft that the Defft cannot see it & then procures a judgment Vient. 80

5. If one sues with. authority in my Talk name where I have good cause of action 14-
But it is apprehended that if this was done from motives of friendship no action would lie — to commence this action untille there is an end of the suit claimed to be malicious is premature, but it is not necessary that there be a decision in favor of the Defft in the former action

There must be an actual damage mere presumptive will not entitle the Defft to this action but the least damage will answer — & the actual dam. is not the rule of damages — There is an imp.t question who for arresting a man away from home in a foreign State, is good cause for this action as if one having a debt against another in which he could recover in this State, to recover the Defft should take the opportunity to sue him in another State. This might put him to great inconvenience & might be sufficient ground for this action.

This action is by our law denominated a vexatious law suit for which noble damages are recoverable

Of the action for a malicious Publick Prosecution

It is necessary to this action that there be malice & want of probable cause 4 Burr. 1974 1 Durnf 541 —

& tho the Prosecutor acts with malice if there was a probable cause no action lies — also if there was no probable cause & the Prosecutor acted honorably & honestly no action lies —

The acquittal in the former case is prima facie evidence that there was no probable cause, but not conclusive — it may be rebutted ~~It lies upon the proof upon the Pltff to shew that there was no probable cause & this he may do by other proof in the last action to shew that he had probable cause~~ If a Justice found sufficient cause to bind the Pltff over, it will generally cleer the Pltff — 1 Wils. 232 — 1 Durnf 193 —

The several grounds for damages — 1st hence the Law presumes damages here no damage need be proved. 2. For any other offence by which means he has suffered actual injury to his reputation. 3 For the expence he is at in defending his reputation 2 H.K. 13/2 Th. 977.

There is no necessity as formerly that the Dft should be acquitted. If there is an end of the suit any way. This action lies — 2 Lev. 205. 2 Burrs 925.

Any person who has aided in this prosecution is liable in this suit.

The defts direct defences to this action can only be — A justification which is that there was probable cause, or no malice or a denial of the act by "not guilty" In pleading the justification the Dfts plea must state that the crime charged & prosecuted was committed, when & where — & his bound of Suspicion Elis 31

Of the Evidence

When the Plf declares & states an acquittal, he must have a copy of the Record 1 Jn Bla. Rep. 385 — The Plf may offer the evidence that was before given to shew the malice — The Dft may prove that the Plf was bound over & need not shew any other probable cause unless the Plf proves direct malice that the Dft knew better, then the Dft may rebut such proof by shewing that there was probable cause — Whether the jury can give in giving damages where Jesuit are joined the authorities are contradictory — If the offence charged could be no offence the binding over is nothing —

Trover

Lecture 49. July 29. 1794

Of Actions respecting Torts

Of Trover

This action lies in all cases where there is 1. a wrongful taking 2. a wrongful use or 3. a wrongful detainer of another man's goods

1. If my property is taken from me without my consent or knowledge this action lies & if it should be returned it does not wipe away the right of action but may be a cause for mitigation of damages — NOTE this action does not lie for real property, nor certain kinds of personal as Chattels real money &c

2. He who comes by a thing rightfully but uses it in a way which he has no right to, is liable to this action — As where one hires goods & sells them, or where a bailee exceeds the bounds of the bailment —

3. Also where a man gets a thing rightfully & exceeds the purpose of the bailment, but detains the property after a demand of the owner —

All cases that arise fall under these heads — In the 3d case a demand must be proved — In the other cases no need of any demand tho some have embraced the erroneous idea that there must be in the 2d case — 1 Sid. 264. Eliz. 495 —

Trover

To lay a foundation for this action there must be a property of some kind in the Plf. It is not necessary that he be the actual owner. He may be bailee &c. There must also be a possession in the Plf and a conversion.

In the 1st Case the tort in taking was the conversion. In the 2d The wrongful use is the conversion & In the 3d The wrongful detainer was the conversion. If there has been a demand & refusal the Law presumes a conversion unless some circumstances appear that shew it not to have been the duty of the Dft to deliver it to the person demanding. As if he had found a watch & a person should demand it of him the Dft could not know whether he was the true owner or not & would be imprudent in surrendering it for if it should happen not to be him who demands he would be liable to the true owner. If however he has satisfactory reasons that it is the true owner who demands, he ought to deliver it. &c. if the owner describes the watch &c.

If the possessor has a lien of any kind upon the property he may retain it notwithstanding the demand. 1 Burr. 423. 2 Bla. 752.

We are never to state a demand in the declaration this being a matter of evidence & evidence is never to be stated.

Trover

In all instances of tortious taking Trover is concurrent with trespass vi et armis. But there was no amotion but only a tort committed on the prop^y. then Trover never lies —

Suppose this tortious taking is attended with a felony as for inst. Theft — Then Trover is concurrent with Theft in action If the Off will waive the felony, he may bring Trover —

Suppose again one steals a horse & sells him, The actions of Theft, Trover, Trespass & indeb. Assump., are concurrent — This last will be commensurate with what the horse was sold for — But this would be but only where the property was sold for its full value —

2nd Case for Instance — Where the P^lt came by the prop^y rightly trespass never lies but indeb. Assump. 2^dly where the bailee exceeds the bounds of the bailment — Trover lies — In deb. Off will not ~~[illegible]~~ A Special action of trespass on the case lies but not the action of trespass —

3. Case In case of an unlawful detainer no action but Trover lies — 1. Str. 505 —

If property is trovered from a Bailee — he or the Bailor may bring the action — If lost by the Bailee he elects to become answerable at all events, whe

Trover

ther he was so before or not — In this subject the same rules obtain, as those in case of waste committed under a lease. If the Bailee brings the action, the Bailor is estopped as to his action of trover but may bring his action of trespass ~~on the case~~ on the case against the taker for special damages — 1 Lev. 282 2 Mod. 37.

The owner of converted property may have his action against any person in whose hands the property may fall, unless that person purchased it in a market overt, or public auction otherwise if the thief cannot be found the person purchasing of him must sustain the loss. If however the article stolen is money & in the hands of a bona fide purchaser he owns it absolutely for obvious reasons

By a judgment in this action the property vests absolutely in the Defdt the Plff gets the value in damages unless the property has been returned to the owner previous to the judgement, in which case the Plff recovers only special damages — 3 Wilson 336 — If the property is sold it vests in the last bona fide purchaser

Trover

Trover has been maintained tho the conversion is not to the Pffs use See a case in 3 Wils. 140.

This action has also been maintained for the whole, where there was only a partial conversion provided that was attended with circumstances of injury to the whole – See the Liquor case in the L. Pr. 576. – no person having a lien on goods can be subject to this action

Trover lies against the Master or servant who does the act in his masters business 1 Wils. 328.

Of tenants in Com. See Durnf 658. & Co. Lit. 200. Cowp. 445.

This action ~~Trover~~ does not lie against the ex^rs for the trover of the Testator But indeb. Assumpt. lies for money had & rec'd – Cowp. 375.

Trover does not lie against a Com. Carrier if the article is stolen from, & taken in such way as he could not prevent – Salk 655. 5 Mun 282 –

Lecture 50th July 30. 1791

Declaration in Trover

It must be stated that the Pff lost the thing & that the Deft found it & converted it to his use – The article must be properly described – A bond need not be exactly described as to sum &c 5 Mun. 262

Dec. of Trover

It must be stated that the goods were converted within 3 years after the cause of action accrued & this is all that is necessary as to the conversion - Jac. 128.

It is usual to state the time when & where converted this is said to be also lately necessary for the jury in Eng. is to come from the place where the conversion was. This however is all a mere fiction for if lost in Ireland it may be stated to have been converted in England Salk 290 - The action is transitory may be brot where the Deft, or where the Pltf lives. ~~Com Dig 78~~ It is usual to state the value, but not necessary

Of the 2d Plea

It is said this must be the general issue but there are exceptions Holt says there might be a special plea in one instance 1 Salk. 198. Pl. C. 73. ~~Com Dig Pl. R. 2 Pl.~~ 1 Ld Raym 735 holds a special plea good in case of ~~trover~~ salvage &c

If the 2d will come into Court, demur on the article & pay costs then may stop the proceedings - Str. 142 ~~1 Salk~~ 2 Jud. Black. 902 -

Of Replevin

In Eng. there are 2 kinds
1st Where goods are taken for rent by distress - This is peculiar to England - unknown to

Replevin

2. Where beasts were taken damage fea-
sant

In Con. we have also 2 kinds

1. Where goods are attached——

2. The same as the 2d in England——

Where goods are attached the pltf
may get a bondsman to give security
that the goods shall be returned or the
debt discharged— or other of these— The case
goes to Court & is tried on the Replevy
If the Plff in replevy is found to owe
nothing, he will be liberated with costs
And if the Ct find that just Plf owes
then render judgmt in favor of the Dft
against the Plf & if the Plf lose the
bond given is the security to the Dft
in replevin may get the damages done by the cattle
& if fairly prised, this is the rule of
damages— If Cattle not commonable
get into my lot, I may have dama-
ges altho my fence be ever so poor
Neat Cattle are commonable but
Horses are not Hogs may be made
commonable by bye laws

Replevy where goods are attached—
I. only getting a bondsman & taking back
the goods— Judgmt goes against the ori-
ginal Dft, & if he does not pay the Reple
vy bond is sued— If a case is tried by
a justice & the damages exceed his jurisdiction

replevin

he must dismiss the cause.

Extent of a Bondsman liability

I have a debt of 100£ & attach 30£ worth of goods they are replevied by B. & I recover If my debtor fails ought B. to be liable for the whole debt of 100£ or only for the value of the good he replevied? There is not only for the value of the goods much doubt what in reason he ought but the law is doubtful in the opinion of some. The difficulty is raised by our stat

Lecture 51. July 31. 94

On the one hand our Stat. asserts that the Bondsman shall be liable to the extent of the judgment and on the other there is no principle better established in the Com Law, than that the Bondsman need not suppose his principle in so good a situation as he was before the goods were taken. The question is whether the Legislature contemplated this principle in the Com Law & meant to note it or whether this clause was thrown in inadvertently not considering its consequences.

If Goods are pawned & money tendered to redeem & refused to receive them trover lies.

Actions of Trespass vi et armis

All direct injuries done to a man's person or to his personal property by another or his cattle come under this species of action.

Trespass vi et armis

The injury must be direct & immediate — & if it only a consequential injury the proper remedy is Trespass on the Case — & Trespass vi et Ac will not lie —

A man may become a Trespasser ab initio when where he acted lawfully at first but afterwards committed some illegal act — As for ins. If an officer bona enter a house with a warrant to take a man & in doing this had to break in per door. tho his entry is lawful, yet if after entry he commits any unlawful act as beating the servants, the man's wife &c &c he is a trespasser ab initio

This however must be a misfeasance to render it a Trespass vi et Ac not a mere non feasance or neglect of duty as if one enters a tavern & calls for liquor &c but will not pay — This is merely a nonfeasance & his action does not lie — but if he had beat the family &c, the action might have been trot —

To this rule there is said to be an exception yet Mr. H. supposes it not to be any exception — As where an officer by legal authority attaches a man & commits him to prison but neglects to return his writ as was his duty for this an action of trespass vi et lies. And it is said that the action does not lie in his neglect of duty in not returning

returning the writ but for the real act of imprisonment, because the officer can not prove that this was a legal act being de priced of the only evidence admitted in this case viz a copy from the Clerks record. It was never returned there & he can not introduce any other evidence of the legality of the act—In this ground therefore it is plainly no exception—See a Capital Case in 8. Rep. 116. Jac. 117. The Carpenter case.

Where the act is purely involuntary & perfectly accidental, this action does not lie. ~~shall not be~~—

To elucidate this rule by examples—

One may be liable to this action notwithstanding the act was involuntary if there was any fault whether of malice or negligence—If one act is unlawful which he is doing & he is guilty of another unlawful act he is liable—as where one out of malice shoots his neighbours horse & happens accidentally & unwillingly to injure a man to whom he did not perceive, he is liable for both these acts—But if he was only sporting over & for deer as another man would do, & happen to injure a person no action will lie 4 Burr. 2092. Rep. 151. There was a case at Nisi Prius, where a soldier in firing at a deer injured him—tho no more to be blamed than other sportsmen, yet he was liable.

Treat. of Civil Actions

Of the Different ~~Kinds~~ Causes of this action

1st It lies for threats if under such circumstances as would intimidate common men —

2. So in Assault this in deposition of Battery is merely an attempt to strike, or thrusting with some weapon

3. Battery. This always includes an Assault. This is any violent, or indecent act. It is to be remarked there must be some act more provoking than Singe will not be sufficient tho these will go in aggravation of damages —

Spitting in a man's face or throwing a stick so as to hit him is a Battery — See Buller's nisi Prius Termingham

Justifications of Assault & Battery —

If an Officer cannot execute his duty without committing a Battery he is justified. But he must not act unnecessarily

A master is justified in correcting his servant, a Parent his child and a Pedagogue, his scholar —

These are all justified on the same grounds — If they exceed the bounds of moderation they subject themselves to

this action — The only difficulty is to determine what is a moderate chastisement The true standard is this They are to be their own judges and when they do what would be an offence in a judge they are liable — If they whip immoderately with malice they are always liable — But if they correct only moderately & shew even so much malice they are not liable If the flogging is ever so severe & yet it is manifest that they acted honestly not maliciously no action lies — The instrument & the manner are evidences of malice — (Remem. the case of the Schoolmaster whipping his scholar who insulted in Women clothes — &c &c)

The Jailor may in certain cases correct his Prisoner as if the Prisoner be insolent, disturb the family &c

If a friend correct a madman he has been justified —

When assaulted Battery in the opposite party is justifiable not on the ground of revenge but self defence — He must however go no further than for purposes of self defence — One may defend by violence property in his possession but he must be careful to proceed no further than is necessary to preserve the goods —

Trespass vi et armis

May one take by violence his property from another? Yes if taken in fresh pursuit but not otherwise for he must not break the peace — Violence may be used to prevent the entry of a stranger into houses or upon land or if he has got into possession by violence, in the same act the owner may turn him out but not if he has recovered peaceable possession yet if he has recovered peaceable possession, the owner being in possession, he may be turned out by violence — as if while the owner was absent on a short visit & should come home & find a man & his family in his house, he might turn them out — For the justifications of father & son when they find each other assaulted see an Essay on this subject —

In Eng. the defence must be special but in Com. it may be given under the general issue

Lecture 52 — August 1st 91 —

It has been a question whether greater damages ought to be given, in a private action by the person injured, because the offence was high handed — W. R. is of opinion that however abominable & aggravated the trespass may be, the damages ought not to be enhanced, because it is a notorious violation

of the Law - for no man ought to be punished twice or trouble for the same act, & the Public are abundantly able to take care of themselves, in an action for a breach of the peace

In case of an A. & Battery the Plff's rank & station in life will be regarded as one rule of damage - It is not barely the pain of body that is to be taken into consideration, but of mind likewise - for an insult to one man may be none to another -

Of false imprisonment -

Any unjust infringement of one's right of loco-motion, is false imprisonment & subjects the offender to an action of trespass vi et armis

The principal class of cases under this subject, is where men or Courts have mistaken their authority & gone beyond it - If a Judge issues a writ knowing it to be beyond his jurisdiction, he is liable - But if he signs the writ, as is common, without examining it, the Plff only, & not the Justice, is liable -

(When the Sheriff &c is liable See Page under Evidence where this subject is taken up fully -

For damage done by Cattle &c there are 2 Remedies

1. The person sustaining the injury may impound the Cattle - 2. Or he may have his action of trespass

Trespass vi et armis

By impounding, he suspends his right to the action of Trespass, but if the Cattle escape thro the negligence of the owner or the Pound Keeper, his action of Trespass revives - yet if it was thro his own fault that they escaped, he loses his right to either remedy - Also if the Cattle die in the pound not thro the negligence of the impounder his action of Trespass revives -

If an Agister, or one who takes cattle to keep, suffers them to get out & commit Trespass, the person injured has his action against either the Agister or owner. If the agister had bad fence & judgment is obtained against the owner, he has his remedy against the agister for keeping bad fence - On the other hand, if the agister had good fence, but the Cattle were unruly, he has his action against the owner.

If a man keeps a fierce, wild animal, he is liable for all damages done by it - But with regard to tame animals the owner is not liable in the first instance unless they had been accustomed to mischief & he was knowing it - Then he would be liable to the full extent. In the declar.

Kelp. v. el & ux

it must be stated that the animal was wont to do such mischief & that the owner knew of this

Lecture 53 August 2 94

In the first of Wils. 155 see the famous case of Wilkes where the whole doctrine of Search Warrants may be found

No authority can be given by magistrates for rummaging a man's house after stolen goods — tho it has been sometimes practised here, yet it is unwarranted by Law — To justify this the Pff must 1st make out that he lost the goods & that they were stolen —

2. That he vehemently suspects the person who stole them to be J.S.

3. That he believes them to be in the house where he is about to search —

The officer is to search only within the place described by the affidavit —

Whoever takes out a search warrant runs the risk of discovering the goods — If they are not discovered the whole transaction is a trespass — Where the property is claimed by the owner of the house

Trespass vi et armis

where found, the Officer should keep it in trust & not deliver it over till the right of property is tried.

Shall a non Jane man be punished for an assault & battery? No — not by the Public; but it is reasonable that, in a private action, the party injured should recover damages

See Hob. 134

A Ministerial officer is always liable for ~~what he does~~ his mistakes. But where he is only abiding to the wrong act he is not liable — as if a Judicial officer commands him to attach a man, tho' the attachment be ever so unreasonable & unjust, yet if it is within the Judicial officer's jurisdiction, the ministerial officer must obey. But the Plff or the Jud. Officer is liable & not the ministerial officer —

A Judicial Officer is never liable for mistakes made in cases over which he has jurisdiction, unless they were manifestly thro' malice — yet if he presumes to act where he has no jurisdiction he subjects himself to an action — Comyn. 476. Str. 851. 4 Rep. 62 This last is the case of a Officer's cutting wood ~~of~~ where Trespass vid

Trespass. Vi et armis

armis lies for cutting the wood &c

One tenant in common cannot bring trespass against another any more than he could trover, unless the article be totally destroyed

2 T. Black. 1092. The Squib case. Whether a man injured by the throw of a Squib can maintain trespass against the throwers. He could. M.R. supposes justly.

See Jac. 367. For curiosity only, about putting one in a Church Yard.

Ex. & Admr. as such cannot be arrested. It is false imprisonment to arrest them. 1 Bl. Black Rep. 119. Same case supported in Willion, [illegible]

An arrest on Sunday is false imprisonment. Doug 040

In trespass all are principals & one stands by under such circumstances that he might have prevented the trespass he is a principal

The action is joint & several. The action may be brot against one or all and when the action is against all, the Pl may get the whole out of any one & he cannot sue the others for their shares

A release to one is a release to all

One of the trespassers may be made use of as a witness against the rest. This is an evidence

Trespass vi et armis

tion to the general rule of admission of testimony, but it is a case of necessity

A judgemt against one offender is a defence for the rest—

The Dfts may defend jointly & if the jury find [illegible] guilty they must not sever the damages— all must be equally liable—

Lecture 5 L. Aug. 4th 1794—

Where the general issue is plead the jury may find a part guilty & a part not tho they cannot when they all join in a justification—

If a Judgmt is reversed neither the Pl nor officer is liable for their conduct under a former judgment formerly in such case the Dft could sue the officer in an action of trespass vi et armis & the Pl in trover— Wills 155 If the officer had raised the money from the Dft & were had afterwards been a reversal of the judgmt the Dft may recover back the money in an action of indebitatus Assp.

The officer always takes property at his peril i.e. if the property does not happen to be the persons against whom the Exn has gone out, the officer is liable to be sued in an action of trespass

respect of it admits

But in case of Replevin the Officer is never liable for there the particular property is specified in the warrant—

Vide of the Plffs declaⁿ in Assault & Battery—

If the Plff means to deny the fact that he assaulted, or gave occasion to the Battery, he replies that the Battery was thro the Defts own wrong, without any such cause as is alledged by the Deft— But if he means to acknowledge he must reply specially & state a disproportionate battery by the Deft— or rather the case must so be stated as that it may appear to be disproportionate—

That the Plff first assaulted is prima facie a good plea— but this evidence may be answered by denying the fact or acknowledging it & proving a disproportionate battery

There is no need of alledging the time when, if it appears from the date to be within 3 years & if he has stated one time he may prove another

Of the mode of pleading a Licence, a release or feoffment

The Deft in Ct defends &c because he says altho' he did come &c at the times &c, yet he had licence from the Plff to act at such a time & that the Plff ought to be barred absque hoc he committed a trespass before or after such time — In this case he must cover all the time before & after the licence — In case of a release he must cover all the time after the release only — for that covers all the time before — & in case of a purchase & feoffment he must cover all the time before the purchase for his trespass before the purchase ~~&c~~ is not merged in the purchase — he is as much liable as any other person —

Action of Trespass on the case

1. This is maintainable whenever one sustains an injury in consequence of a lawful act 1 Ro. 344. as where one digs a drain & the water runs into his neighbours cellar —

2. from an unlawful act Bac. 140 as if one throws a log into the highway & another stumbles over it in the night —

3. Where the injury does not arise from any positive act, but from a neglect of duty—

It is said that where a man finds a thing & suffers it to spoil thro' carelessness he ought not to be liable but it would appear that he ought if any care was taken to preserve it. For had another man more careful found it & the owner would then have received it sound. But there is no question but that if he had not taken it into his care he would not have been liable, but if a man will undertake to keep a thing in trust he ought to be liable for any damage as if he was a bailee—

It makes no odds about the intention of the person injuring; if the thing is damaged in consequence of his neglect he is liable whether intentionally done or not— 2 Lev. 172- & 196.- True he need not be perfectly careful- but if so negligent that a common man would not have suffered the thing to damage then liable —

If the act is a public damage the action must be brot by them, & no private action can be brot, till some private injury is sustained Salk 12

Trespass on the Case

An employer is liable for Damage done by his Servant as if the Person employed must his act against another carelessly & the Master is liable 2 Str. 1064

(Several of those cases mentioned under the head of trespass vi et armis ought to be ranked under this head as in case of injuries done by ~~his~~ animals to another's property or person by biting, goring &c 2 Str. 1264)

1. Of injuries done to one's person in important cases is where the ~~person~~ finger or any part of the body is injured by a ~~Regular~~ Physician or Surgeon — In all such cases this action lies but if done by a quack doctor there no action, for it was the essence of folly to employ him. L^d Ray^d 2 14. This was where a regular Physician injured a man by attempting a new experiment This ought to have been in action of Aff. & Battery —

2. Is where persons are injured by corrupt liquors & whoever sells there is liable 1 Roll 96. Car. 510

3. This action also lies for beating a man's servant, or child — also where one's wife is beat Both husband & wife have their actions — Per quod consortium

amisit & she with him for the Battery
~~This remarked~~ This class of cases tho
ranked by authors under Tresp. vi et armis
W. R. thinks they ought properly to be un-
der this head.

The Father also brings this action
per quod Servitium amisit for debauch-
ing his daughter & special damages are
recovered altho the recovery is entirely
on another ground. The loss of ser-
vice is ~~not~~ the smallest ingredient in
raising the damages ~~The damage~~ for
where the daughter was before a lewd
woman, no recovery is had, & yet in
either case their is equal loss of service.
The true ground, is the injury to the
feelings of the parent & consequent disgrace

No one but the father or mother
can bring this action, & it makes no
difference whether the daughter is of age
or not, if she is in the service of her pa-
rent so much as to milk a cow (Says L. Mansfield)
the parent has the action — 2 Durnf

Lect. 5.

Trespass on the case

Of the liability of Sheriffs for their under officers wrongs

The Sheriff is liable civiliter, not criminaliter for all the torts of his under officers whilst in the execution of his business. Salk 16.

Formerly Sheriffs were not liable & the greatest villains there [illegible] their officers — but since they have become liable it is easy to see that they must be more careful to appoint faithful officers.

Where the action is for neglect of the under officer, the Sheriff alone is liable to the person injured & the under Sheriff to him.

There most capital class of cases under this subject is [illegible] where the officer suffers the Prisoner to escape.

It is a rule of Law that wherever the damages can be ascertained an action of debt will lie. On this principle this actⁿ also lies against the Sheriff for suffering an escape on Execⁿ but not on mesne process.

To constitute an escape there must have been an actual arrest or that which amounts to this. An actual arrest is where there is a real touching.

A constructive arrest is where there is no touching, but the officer reads the warrant & the Prisoner goes with the officer.

& thus impliedly acknowledges himself his prisoner. This depends altogether upon the submission of the Prisoner for if he refuses to be taken & runs off, it is no arrest Bacon. Ab.

Assistants to the officer may arrest if in his company so be in his company they need not be in the officers sight but may be distant from the officer however must be out on the hue & cry.

If the Prisoner escapes then the Sheriff becomes liable. The doctrine of escapes consists of positive rules & it is not to be enquired what is reasonable? for those rules are fully established as law

1st Anciently By the Com. Law the Sheriff who suffered an escape was to stand in the criminal's Prisoners place & suffers such a like punishment he was to suffered the prisoner. Upon any first conviction

2 In the 13 year of the reign of Edward the 1st an act of Parl was allowed by the power of the Crown Westm. 2 Ch 31 giving remedy of the cruelty & injustice of the Com. Law extending the equity of this kind this Stat. to all other cases from England after that time

3. ~~At contrary & an Act after~~ it doth not trot an action of Escape on the The act on the case was made in Edw. the same reign of 13 E. 1. but not applied to the Sheriffs till 150 after

Resp. on case

~~case was adopted by the Ct~~ See the 1st volume of the Lectures for the whole subject & Reeve's Hist. Eng. Law

Lecture 56. Aug. 6th 1794.

Where the Prisoner escaped thro the neglect of the Jailor or the insufficiency of the jail &c & the Ct brings this action it is a litigated & unsettled question whether judgmt must be rendered for the whole amount of the execution or for damages at the pleasure of the Ct — Our Sup. Ct & the Ct of Errors have each decided different ways at different times, so that the doctrine is yet open to litigation — M.R. thinks there is no doubt but the sum in the exn ought to be the rule of damages — When the Ct decided against this opinion, they went on the ground that it is the very nature of an action on the case, that the damages should be uncertain & the Plf must rest his suit to recovering more or less than the exn — ~~M.R. says that~~ This rule they

The Court decided in this case that the damages were uncertain, & left it to the discretion of the jury to assess the damages according to the circumstances of the case.

would keep inviolable. Mr. K. says that in an action on the case the damages are frequently ascertained as where debt & case are concurrent ~~in debt for rates~~ he supposes that in many such cases the damages are completely ascertained & that the jury & not the Ct can vary them — The Eng. Law & Com. differ respectg. an escape on exn in one particular — Where the officer releases the Prisonr the Sheriff is liable immediately in Eng. But here the Prisoner may come & surrender himself within 60 days after the exn issues & it is as well as if he had been kept in Prison, & the Sheriff is not liable till after the 60 days — for no body knows but the Prisoner will surrende himself in that time — But if the Prisoner has been in jail & escapes any way the Sheriff is liable immediately —

If the process is void the Sheriff is excused as where judgmt was obtained fraudulently Salk 273 — Carth. 418.

Trespass on the case

The Sheriff may sue the bondsman before he is sued by the Creditor See Eliz. 53 where more liability is settled This is fully settled as to Sheriffs it is a ground of action

If the debtor was a Bankrupt when taken & escapes, in Exp. his bondsman is liable altho his body could not the creditor in no better situation But Ors Ch have adopted a more equitable principle that if the Creditor has not been injured by the escape, the bondsman shall not be liable See Finlay Rep. ~~in the Court of Chancery~~ 2 Wil. 325. 4 Burr. 2060

See Salk 80 where an attorney is liable if he neglects to have the writ signed & issued Also a Justice must sign if offered & if any damage in consequence of his neglect then liable So of all other ministerial officers—

Where the naked Bailee is liable to this action See 2 Str. 1099. 2 Ld Ra. 903—

This action lies against a Com. Carrier He is liable when the goods were lost any other way except by the act of God,

negligence on the part
or by the open enemies of the land 2 Raym.
909. 1 Wm. 128. Where it is owing to the act of
God alone then clearly not liable But where
negligence is united with this where it ap-
pears that the Carrier was to blame there
he becomes liable 1 Burnford 27. This
case says, the Carrier must not be any way
to blame 1 Vent. 109. 1 Burnf. 33.

To make him liable the things must
have been committed to his sole care

If the owner is to blame, the Carrier
is not liable as if he deceives the Carrier
by ~~stating~~ giving him believe the goods were under
their real value 1 Wm. 145. Carth. 485
4 Burr. 2278. 2 Salk 640. 5 Burr. 2611
3 Wills. 429. 443. about Letters in a Post Office
The Consignor or Consignee may bring
the action against the thief who steals the
goods 5. Burr. 2680

Coachmen are not consid^d Com. Car.

Post Masters not liable for the roguery
of their under officers. Comyn. 73 4.

Rule in pleading If either party states new matter
he must leave it open for the other party to traverse
remember this

Action of Resp. on the case

Lecture 57th August 8 1794

The pawnee is liable, if he uses the pawn negligently, as he would not his own, to this action

He is liable at all events, & that not except after tender, & refusal on his part — It is a general rule that the pawnee must not use the thing pawned But there are exceptions as where the thing is not the worse for using as a jewel for inst. or where it is a charge to keep as a horse — If moreover the jewel is stolen or lost the pawnee loses — but if the horse is stolen the pawnee is not liable — 2 Salk 522

This action lies wherever any thing is abused by the bailee, or where it is applied differently from the design of the bailment —

Where the purposes of the bailment are exceeded, & damage is done accident happen the bailee is almost universally liable — As if a horse should be stolen when out of the bounds of the bailment but where

may be instances where it might be litigated as where the horse died with some disease which he evidently would have died of had he not been out of the Stable

Tavern Keepers are liable to this action, like Common Carriers & like them have a lien, till paid their fees. It must be a traveller, & this traveller must have entered himself as a guest, to make the Tavern keeper liable — Caleys. case 8 Rep. 22 or 32 Moore 78. Eliz. 622.

This action also lies for all deceit for this subject see Lectures 1 Volume.

Lecture 38. August 11th 1794.

When one sells an article knowing himself not to be the owner, he is liable to this action. If he was ignorant of the fact of ownership indeb. assump. for money had & recd lies If any fraud in the transaction special damages are given in an action on the case, but not in indeb. ass. Cro. Jac. 474. Lutw. 593 Salk 211. The 2 last go on the ground of ignorance of his not being owner. If it was a bargain of his own neither of these actions lie, if the purchaser pays of the defects of quality & title.

Trespass on case

The rules then are these 1.

1. If one sells an article to which he has no title being ignorant of this, an action for money had & rec lies—

2. Where he sells the article knowing that he has no title an action on the case for fraud lies—

3. Where he has the title, but there is some defect of which he was ignorant, no action lies—

Where a person obtains property out of the hands of another by deceit as where he goes under pretence of being commanded or requested by a creditor to take up money from a debtor & appropriates this money to his own use, he is liable in this action

Moore 589—

Where a man sells an horse & all in his position he is not liable tho' he has no title Salk 213 Jac. 196—

By the Eng. Law an infant is liable criminaliter, tho not civiliter for fraud—

A feme covert not liable for fraud.

1. Where one Merch.t sends to another who owed him the amount of insurance money, to insure goods, vessells &c, & he refused he is liable to this action on the case 2 Burr 1187—

2. Where Merch.ts have frequently insured for each other one refusing upon the request of the

other is liable also to this action —
3. Where one sends bills of lading to a foreign Merchant with a request to consign the same & insure back, if this Merchant accepts the Bills & consigneeship, but fails to insure he is liable —

Of the action on the case for Adultery —

This is generally brot as an act. of Tresp. vi et Ac — yet it is an act. on the case & Mr Reeve says the words assault vi et Ac are entirely needless —

The 3 grounds of Damages are
1. The injury to the feelings of the husb. —
2. The alienation of the wife's affections —
3. The imposing upon the husb. a Spurious Offspring
It is settled that if these 3 grounds of damages can be proved no justification can be made. By the old authorities, but lately a different opinion has prevailed — At least it is agreed that circumstances may be admitted to mitigate damages — as 1. an actual or implied assent of the husb. 2. no imposition of a Spurious offspring &c
3. The lowness of the wife's character & where no character is put in issue by the pleadings the Plt may prove particular facts to criminate her character —

Trespass on the Case

Damages are enhanced by the former happiness of the couple. The good character of the wife previous — any peculiar obligation the Dft was under to the Plf — the Dft being a man of great property — and the high rank of the husband & his wife —

Lecture 5th Aug. 12 - 94 —

In the acts for adultery the incontinency of the husband is a ground for extenuating damages, his brutality, their former unhappiness —

Principles relating to a rescue

The Sheriff may bring an action on the case, or trespass, or else against the rescuers By the Eng. Law the return of the Sheriff (that the prisoner was rescued) is complete evidence against the rescuers in a criminal process, but in a civil, may be relutted —

In the declar the original cause of action the process, the arrest & the rescue by the Dft must be stated — The name of the [illegible] is unnecessary. When the Sheriff sues in this action, the damages recovered are always the amount of the demand against the prisoner, & the same in the case if the creditor sues instead of the Sheriff provided the prisoner was taken in execution, or on mesne process if a

On Case

Bankrupt. The person rescued is a good witness from the necessity of the case tho he is interested to charge the rescuers for then he is exonerated. An escape is also a good witness to charge the Sheriff, tho interested when the escape is voluntary. We have a Stat. on polling officers to do their duty, which besides the com. Law remedy inflicts a fine for not returning the writ, but to subject the officer the action must be on the Stat. & not merely on act. at Com. Law on the receipt and it seems by a determination of the Sup. Ct that the Stat extends only to mischances with a writ on mean process. Is this the true meaning of the Stat?

An officer is obliged to serve a writ if his fees be not tendered him

An act. on case lies for enticing away one's wife, tho there is no charge of crim. con. but if there be justific. cause of which the Ct are judges, no act. lies.

This act. lies for enticing away a Jew. 2 Lev. 68. comp. 54. A journeyman is a part of his family 3 Burr. 1344. This act. lies for refusing to have the poll unmarked at an election. 1 Bent. 95. Also for a voter if he is prejudiced his privilege Salk. 19. 5 Co. 73 a. by granting a lease returned

421 Escape. On Case, — Assumpsit

In an action vi et armis under alia enormia matters which could be found a Ca. for an action on the case may be given in evidence to the Jury. The Plaintiff Demands — When Secret Committee to Portsby for Martin Lee 2 Str. Lee 1 Wils. 410. 1054 1083 944

Debt lies for a Debt each on the escape.

State an original suit before a Court of competent jurisdiction. The judgment rendered by the Ct specifying the sum, & that an exon issued upon the judgment, that it was delivered to an officer, naming him, properly qualified, that he did arrest the Deft on the exon & that afterwards he suffered him to escape. Or if it be the goaler who is sued, state the commitment to him by the officer & that he suffered him to escape out of goal. It is unnecessary to state whether the escape was negligent or voluntary, for that will come properly in the replication.

Lecture 60 Aug 13th 94

The Lowest kind of contract is Parol — these are either express or implied. The technical term for these actions is

C Assumpsit

An express assumpsit is where the parties entered into a particular agreement as to build a house &c

non assumpsit is the plea

Implied Assump. it where the Law implies a promise from certain circumstances. These circumstances must be such that when taken together it appears that one man ought in good conscience to pay another a sum of money.

An implied assumpsit will lies wherever an express will except where damages are in their own nature presumptive. here the express assumpt. must be brot founded on the contract.

1. In all cases where the sum in damages is certain debt & indeb. are concurrent.

2. This action lies where goods are sold & no price agreed upon, & is concurrent with book debt, & an action of debt — for a quantum vale

3. Where one labours for another & the wages are not agreed upon — Here indeb. lies for a quantum meruit & book debt & debt also lie — ill being capable of being reducing it to a certainty as the market price is fixed —

4. Upon an insimul computasset where the parties have accounted & a balance is found debt is concurrent with this actn —

5. For money loaned Debt is concurrent & if a promise to pay special assp. lies —

6. For money laid out by request. The case is the same as to Debt & Spec. Assp.

7. For money laid out without any request as to Assp. the Defts family in his absence &c

8. For money had & recd to the Plffs use - This may happen different ways. In short whenever one has in his hands another's money which he can't in justice retain, this action lies - & this whether there be any contract between the parties or not 2 Burr. 1010 - As where one pays money by mistake - Salk 23 - where it is taken by fraud, where a man finds another's money, or refuses to redeliver money delivered to him. Insurer is also concurrent in these cases.

This also lies to recover back money paid on a judgment of Ct when circumstances turn up subsequent to the judgment plainly showing that the money cannot in good conscience be retained - & which if they had appeared before trial there would have been no cause of action - as after a recovery upon a policy of insurance upon a vessel supposed to be lost, the vessel should return - But never for a mere erroneous judgment.

Where there was a just debt but

the security for it was illegal & void, as if gotten by duress &c upon the avoiding of the security Indeb. Ass. lies for the money due on the contract - 1 Dunn 732.

When money is extorted from one as by taking an undue advantage of his situation or in any other oppressive manner this act. lies. 1 Doug. 672 Bromley & Smith But where the parties are equally in fault no relief is granted -

Ang. 14th Lect. 91. - 94

Upon the Stat. of frauds &c See page 35

Ang. 15. Lecture 62 - 94 -

Assumpsit lies not only upon parol contracts but also upon such written contracts as are not specialties, which are such as do not detail the consideration at length but simply express "for val. rec'd" Of this kind are receipts in this country In such cases the action of Book-debt is usually brot which is a species of ass. & the receipt given in evidence -

It is doubtful whether an action may be sustained on a receipt of more than 6 years standing that being the limit of book-debt action - Some determination of our sup. ct seems to favor the idea that such an action might be sustained -

425. Assumpsit Vendues &c

It is common especially in important bargains for the buyer to make a deposit of some money as a security for the bargain - In such if the vendor refuse to deliver the articles the vendee may have trover, or assump. to recover back the money. Or if the vendee will not complete the purchase the vendor may either affirm the bargain & sue in assump. for the remainder of the purchase-money, or he may let the matter rest & keep the deposit which is a forfeiture in law & equity 1 Com. 745.

At a vendue when the article is struck off to the bidder the bargain is closed, but if the purchaser does not pay down the price unless an agreement to the contrary the vendue-master may resell - He is obliged to strike off to the highest bidder & cannot adjourn the vendue till he has without being liable in an action be the sum ever so small - He must not employ one to bid for him, or the owner of the goods to prevent their going to the highest fair bidder & tho he does strike off the article to the first employed bidder the property he longs to the highest fair bidder - Comp. 395

Wagers in Eng. are recoverable at law, except where they are cut off by stat, — but the Cts suffer recoveries rather on account of former precedents than because such a practice is consistent with principle — There has been no decision on this subject in this country but it is apprehended our Cts would adhere to principle notwithstanding the precedents —

The requisites to make a wager binding in Eng. are, 1. The event must be contingent, & unknown to the parties 5 Burr. 2803 Cowp. 37.211 must be of such a matter as will not give occasion to the introduction of indecent evidence, or injure the feelings or reputation of a 3d person Cowp. 729 — 3. No wager will be good, made use of to cover an illegal transaction, or 4 is in its immediate effect contrary to public policy — Dunn 56 — Wagers are never considered in the light of a debt contracted & neither debt nor indeb. will lie — a Specia assump. is the only action —

Assumpsit

Lecture 63. Aug. 16. 94

Assumpsit will not lie to recover back a voluntary courtesy tho done for the advantage of the person & with an expectation of a reward, but if the person benefitted promise to pay it he is bound to do it. Such cases are to be distinguished from those where money was advanced by agent &c &c—

In Assumpsit a promise to pay so much money is the rule of damages. Hence if there was an express promise for a certain sum, but the jury are at liberty to determine what in equity is due. & yet there is one exception to the rule "that where there was a promise to pay a sum of money, the recovery is to be accordingly" — where the promisor was entrapped not knowing the extent of his promise. the early case for example—

When the consideration is illegal the contract is void, & if it is stated in the declaration, as it must be in Assump. that

Spurrier

the consid^n giving the equitable claim might be proved, demur to the declaration & if it is in a specialty & contained in the condition prayer recite the condition & then demur. But if there be no condition but merely "for value rec^d" plead the illegal consid^n in bar & substantiate this plea by parol testimony — for there is no obligation however solemn if given for an illegal consideration, but what the consid^n may be gone into for the purpose of vacating the contract — for any degree of illegality vitiates the writing — Cruttwell Elec 199 —

Money won at play cannot be recovered & if paid cannot be recovered back at Com Law. Tho by Stat of Ann it may for in all cases where the parties are in pari delicto the law leaves them where it found them

If A promise B. 10£ to beat C. & he does it, he cannot recover it, & if A has paid it he cannot recover it back. yet if one of the parties come into Ct upon the ground of rescinding the contract, he may recover

4 Burr 1901

back his money — as if B does not beat C. accord to agreemt. A may recover back the money — Evidently bad policy — It encourages B. to to Assault C — for if he don't he loses his cash. Doug. 453. 1 Ray 89 —

Where one by deception gets another to do an illegal act unknowingly towards a 3d person, as to imprison him & the like, & the person imposed upon is sued & damages recovered of him for that mistaken act, he may recover against the person deceiving him Hob 55.

If one promise another a reward to do what the law obliges him to do as to an officer to serve a writ, the promise is void & no recovery can be had Burr 924

The Case in Comp. 793 seems to have established a rule that in Assumpsit which is in its nature an equitable action, a Plf can never enforce an unconscionable demand

Where there is no consideration at all or a frivolous one, no recovery can be had — What is meant by a frivolous consideration is not that it is inadequate

but one that may be removed at the instant the promisor will to deny it. As if the consid be to make an estate at will. It is determinable instantaneously & consequently is no consid.

When the consid of the promise was past, the law anciently was that no such agreement to pay was binding; that is, it was no legal consid unless there was some kind of previous request. But the Law now is that if the act done was beneficial in any way to the promisor it is a sufficient consid for a future promise to pay it, but if not beneficial, it would not unless there was some kind of previous request. Hut. 84. Cro. Car. 282.

If one being indebted to another promise him that in consid he would not sue him by such a time, he being specified, (for otherwise it would be of no force) he would give him such a sum, it is recoverable. If A. owe B. 10£ on note for any service & afterwards for the same they promise to give him more the promise that a debt being

Assumpsit

equitable may waive the note & sue in Assp the new promise & recog is notwithstanding the gen. rule That you can't sue upon a Parol contract when you have another of a higher nature —

N3. Wills & Revocations

The Stat. Hen: 8 requires no particular Solemnities to Wills & consequently none were required to revoke on the leading principle that a subsequent ~~instrument~~ contract may destroy a former one of the same nature. Accordingly a variety of cases arose where no solemnities were required to revoke a Will. But afterwards the Stat. 29 Car: made certain Solemnities requisite both to make & revoke a will. so that many things which before would revoke were cut up by the roots by the Stat. of Car: But since this Stat. it has been adjudged in a number of cases (for which see Powel on Devises) that this Stat. referred to express Revocations & left implied revocations as at Com. Law. Our Stat. has adopted the first part of the Stat. of Car: respecting the making of Wills & has left out that clause relating to Revocations so that it would seem that our Stat. has left the doctrine of Revocations as at Com: Law. Tho it is strange that the Legislature should break in upon that universal principle running thro all contracts &c That "no contract of a higher nature shall be "avoided by one of an inferior nature" —

On the footing of reason & Common sense a will ~~attended with~~ made with great deliberation & attended with special solemnities ought not to be revoked but by an instrument made & attended with the same deliberation & solemnities unless indeed in those cases of cases under the head of implied Revocations.

The Writ of Mandamus lies to restore persons to offices, to compel corporations to elect officers & to compel Officers to execute their respective duties. As if a Register refuses to record Deeds this Writ lies to oblige him to do his duty &c &c See Esp. & Kirby's Rep. where it is settled that it lies in this Country —

It is a settled rule in the Sup: Court that witnesses may testify what a Party in the suit said against himself, but not what he said in favor of himself unless it was in the same conversation in which he spoke as to himself. — remember

It is also a settled rule in Sup.ᵐᵒ Ct. that

An Essay on Descents
by Jeffery Reeve Esquire

The Stat. of Descents both of Real and personal property is manifestly derived to us from the Eng. Stat. of Charles 2d respecting Intestate Estate. So far as it respects the distribution of estates among the lineal descendants of the intestate it is in terms the same with these differences. The Stat. of Car. respects personal property whilst our Stat. embraces both real & personal. Besides with respect to collateral kindred there is a greater difference tho formerly there was none before the Revision of the Stat. of this State A.D. 1784.

The present Stat. differs from the Eng. Stat. of Car. 2d as it respects property that came by descent, deed of gift or devise from some kindred. The Eng. Stat. prefers brothers & sisters of the intestate & their legal representatives to the next of kin, that is the parents of the intestate. And instead of distributing the estate "to all the brothers & sisters of the intestate & on failure of them to any of his kindred that are next in degree" as is clearly the meaning of the Eng. Stat. it restrains

Descents

the distribution to the Bro brothers & Sisters, & on failure of them to such kindred as are of the blood of the ancestor from whom the estate came — In this our Stat. agrees with the Engl. viz. that it is immaterial whether such brother &c be of the whole blood or whole no. viz. they are of the blood of the ancestor from whom the estate came —

— With respect to persons & such real estate as was acquired by the intestate any other way than by descent, Deed of gift, or devise from some ancestor — It differs in ordering brothers & Sisters of the whole blood to the next of kin viz. parents, & in making a difference between brothers & Sisters of the whole & the half blood & this is the only difference — for altho the Stat. proceeds to point out that in default of brothers of the whole blood parents shall take the estate, & for the want of such claimants brothers & Sisters of the half blood, yet this is no more than would have been effected if the Stat had after the preference of the brothers &c of the whole blood made use of the same terms used by the Stat of Car. viz. the next of kin & their legal representatives.

The mentioning Brothers & Sisters of the
ye blood in the Stat. expressly forms the purpose
of ascertaining that brothers &c are to be pre-
ferred to grandfathers, grandmothers &c who are
in equal degree with them from the intestate
And altho this express provision is not made
by the Eng. Stat. yet the Courts at Westminster
Hall have so construed the Stat as to give
them the preference which is secured to them
by our Stat. In all other respects our Stat. of
distrib.ns is a literal transcript of the Stat. of Car.

In discussing the subject I have
computed the degrees of kindred by the Civil law,
as is done by the Eng. Cts when distributing estates
under the Stat. of Car. & have supposed the same
construction of terms is to be given under
our Stat as have been given to the same terms
by the Eng. Cts. for whenever the terms used
in the Eng. Stat. have recd a construction &
certain determinate ideas are affixed to
them by the adjudications of Cts & we enact
a Stat. upon the same subject & use the same
terms, it carries evidence in the highest degree
that the Legislature is consented with the con-
struction given to these terms, for if it had

been otherwise they would have expressed themselves in other terms, or at least have given an explanation to the terms used comporting with their own ideas — since the terms used were well understood to convey certain definite ideas in that country from whence we derive our language & laws —

The Legislature must be supposed when they enacted the Stat. to have adopted the construction given it by the Eng. Cts & in all cases where there are Eng. Statutes which we have adopted or copied at a time when such Stats have recd a constn. I apprehend such construction is emphatically our Law. It is the same when they use technical terms without defining them — We have no where to resort but to the Eng. Law Books where we shall learn their definition — We shall acquire from them the determinate meaning affixed to such terms, & these definitions are as truly our Law or the legal definition of such terms in this country as it is in Eng. — as much so indeed as if the Legislature had defined the terms in the same language used in the Books —

As for instance where our Stat. punishes murder without informing us what murder is & how distinguished from other species of homicide we must resort to the books of the Law & from them we may learn what was intended by the Legislature — So when the Legislature enacts a copy of an Eng. Stat. the rec'd construction at the time our Stat. was enacted ought to be discerned & deemed of the highest authority importance — I shall therefore consider the decisions of the Eng. Cts in such cases as have come under the Stat. of Car. as precedents which will govern our Cts in their decisions with the exception of those cases where our Stat. has expressly enacted differently which have already been pointed out

1st Of that clause of our Stat. which provides for the distribution of the estate of a dec.d person among his childn & their legal Representatives —

Since the Repeal of that part of the Stat. which regarded primogeniture in so great a degree as to give the oldest where there were no issue male an elder Son, a double portion — such childn & their legal representatives share their estate in equal portions that is if the childn are all living they take equally. If some of the childn are dead leaving childn &

whilst others are alive such grandchildr of the intestate take what their parents would have taken had they been living — If all the childn had been dead leaving childn such childn will now take per capita each in his own right an equal share & not per stirpes — and among lineal claimants representation is continued ad infinitum — and as long as any lineal descendants are to be found collateral kindred are excluded — It is immaterial what kind of estate the intestate owned at his death whether real or personl or whether the estate came to him by descent or was acquired in some other way it is distributed all in the same manner — It is remarkable that the Stat does not design to contemplate the estate of women but I presume no doubt can be entertained but that the estate of a decd female is to be distributed in the same manner as that of a male — It has been a question in the Eng Cts whether a posthumous child was entitled to a distributary share under the Stat. of distributions, but it is settled that such child shall share equally with his other brothers & sisters if he has any whatever may be the ideas entertained on the subject by the Com. Law —

Descents

It is clear by the Civil law that such child is entitled to his share ~~equally with his other brothers & sisters if he had any to whatever~~ ~~as may be entertained on the Subject by the Com~~ Law & the Civil Law has always governed in the construction of the Stat. of Distributions

In the case in Atk. the Chancellor says that it is fully settled that the Stat of distributions is to be construed by the rules of the civil law. It was objected that it was impossible that such child should inherit before it was in esse for the distributary share under the Stat vested in the claimant immediately upon the death of the intestate. So that if such claimant should die before distribution yet his share was transmissible & would go to his representatives & it is admitted that such distributary share vests upon the death of the intestate. But the case where there is a posthumous child, to speak in the language of civilians, vests in ventre sa mère & that point see the case of Wallis vs Hodgson 2. Atk 115. which is an authority where the case was E. Wallis sister of J. Wallis born after the death of the latter should inherit a share of his estate with her mother who by the Stat. of James 2d

altho she was nearer of kin to the child than a brother or sister could be is placed upon the same footing with brothers & sisters. It was determined that E. Wallis should share equally with her mother, and altho the doctrine laid down in Palmer & Alcock & Gudgeon vs B. is recognized as good law that the distributary share vests immediately upon the ~~intestates~~ intestates death yet this was held to be no reason why E. Wallis should not take her share. The Chancellor held that she was a person in rerum natura & capable of taking in ~~esse~~ esse as mere. So it was also held that a devise to such a child was good & a Will in his favor might be brot to obtain an injunction for committing waste.

A distinction obtains in the Civil Law between a child in ventre sa mere & one only conceived. The former is entitled to a share of its parents estate while the latter is not. I find no case in the Eng. Reporters recognizing this as a sound doctrine & I apprehend in this country where posthumous children are, no such difference has ever been contended for.

Of the case of the Stat. of descents which declares that real estate which came by descent or deed of gift to the intestate from some ancestor or kindred that the same shall in case there are no kindred children of the intestate nor legal representatives of such children descend to the brothers & sisters of the intestate & their legal representatives of the blood of the ancestor from whom the estate came, & for want of persons who shall render this right in such estate shall descend to the next of kin to, & of the blood of, the ancestor from whom it came. In this branch of the Stat. if there are no children of the intestate, or their legal representatives it descend to the brothers & sisters of the intestate provided they are of the blood of the ancestor from whom the estate descended & it is immaterial whether they are brothers & sisters of the whole or of the half blood, they shall inherit equally if they are of the blood of the ancestor.

The requirements of the Stat. are that the person who inherits shall be a brother or sister of the intestate & that they be of the blood of the ancestor. Suppose J.S. dies intestate having rec'd an estate from his father Roger Stiles by descent & leaves T. Stiles his brother of the whole blood & also leaves his brother Dick

Stiles of the ½ blood- the Son indeed of ~~his~~ Father Reuben but not of his mother Mary Stiles in such case Dick shall inherit equally with Tom- for he is brother of J.S as well as Tom- & he is equally of the blood of Reuben from whom the estate came

Let us suppose also that J.S left a brother Sam Rowe the Son of his mother Mary by her first husb.d. In this case Sam is excluded from the inheritance of such estate so descended from Reuben- for although he is the brother of J.S he is not of the Blood of Reuben which the Stat. requires- If there was no authority to guide me as to this point, the general intention of the Stat. which manifestly intends to preserve the estate in the family from whence it came would furnish an answer to any objection, as the general object is that the Estate shall again return to the blood of the ancestor from whom it came- & the ½ brother Dick Stiles has an equal quantity of the blood of Reuben from whom the estate came with Tom- But this idea is supported by precedents, for it has been adjudged by the Eng. Courts upon questions that have arisen between brothers of the whole & of the ½ blood that those of the ½

shall take equally with those of the whole for as no discrimination was made between brothers of the ½ & those of the whole blood it was out of the power of the Ct. to make any as all that the law required was that the person claiming should be next of kin, which was to be ascertained only by computing the degrees of kindred & by doing this we arrive as soon at the ½ as the whole blood. It was proximity of blood & not the quantity that was regarded by the Stat. Vent. 316. 323. In the case of Tracy & Smith this point was settled by the whole Court which has ever since been adhered to tho' there seems to have been before that time a different determination. The same observations may be applied to our Stat. No discrimination is made in this branch as it respects ancestral estates it requires that the claimant should be the brother of the intestate & such is Dick.

It also requires that the claimant should be of the blood of the ancestor from whom the estate came & Dick has this qualification also. It is therefore out of the power of the Ct. to add a qualification not required by the Stat. & of which there is no relation of the intestate who is of the blood of

Reuben then such estate [illegible] escheat
It is not so expressed in the Stat. but this
is a necessary consequence of the restriction
laid upon the inheritable quality of such
estate — As the doctrine of escheats is not
applicable to Personal Estate it will be im-
possible to find any precedents respecting
this matter in cases that have arisen un-
der the Eng. Stat. of Distributions but is an-
alogous to the Eng. law of descents furnished
by the feudal maxims that whoever in-
herited an estate must be of the blood of
the first purchaser, & the known conseque
-ce that it would escheat rather than any
other person should inherit would there-
fore in this instance happen — That ac-
cording to the feudal ideas of the blood
which meant lineal descendants only when-
ever a person purchased an estate it could
be inherited by no person but the heir of
his body & this was the law as it respected
a [illegible] by purchased estate or non-feudum
as it was called — For the purpose of letting in
collateral kindred to the inheritance & to
prevent the mischief a fiction of law

Leeson vs

was invented that every fee-dom now in
should be held ut antiquum & that the Law
supposed that it descended from one ances-
tor — and as it was impossible to know from
what ancestor whether from maternal or
paternal lineage, it was to be consid as a kind
of indefinite antiquity that might have
descended with the same probability from one
ancestor as another — This Fiction let in all
the collateral kindred of the deed to inherit
fresh estate in their order for it being uncer-
tain from what ancestor it descended there
was a degree of probability that it came from
the ancestor of the claimant whoever he might
be so that he was a kinsman of the deed &
probable to all — This probability created by
fiction was sufficient to prevent the estate
from escheating — but when the estate was
actually a descended estate, it could not be
inherited by any kinsman on the part of
the Mother & vice versa, & on failure on
part of the Father or on part of the Mother
fresh estate ceased to have any inheritable
qualities — He that after having provided for

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descend)
for Brothers & Sisters & their legal Representatives, proceeds to direct the descent of such estate to the next of kin to, & of the blood of, the ancestor from &c —

It is apparent that the legislature has not used the terms "of the blood" in the feudal sense it being a maxim of the feudal System "that no person shall inherit an estate unless he was of the blood of the 1st purchaser" which was understood to be some person lineally descended from him to the exclusion of his collateral kindred

It cannot be so understood in this State, for when the Stat. made provision that the estate should descend to the next of kin to, & of the blood of the ancestor, if it descended from a Parent it was, in the event of a total failure of all lineal descendants of the ancestor from &c, absolutely uninheritable if thus understood — for in the case but if Js dies without brothers &c & their legal &c of the blood of the ancestor Reuben &c it shall descend to the next of kin to, & of the blood of the ancest.r &c, but in this case all the lineal descendants of Reuben have

descents
utterly failed - Therefore it can't mean
his lineal descendants, for it is clear such
estate is already descendible, by a previous
provision of the Statute to the Brothers &c & their
Repr. if they are of the blood of the ancestor.

If the estate came from a father
or mother, it is manifest in the Feudal sense
of the word the Statute has by mentioning the
brother & sisters of the intestate & their leg. Repr.
included every person that could be of the
blood of such ancestor. It would therefore
be absurd to provide that on failure of
such it should go to the next of kin of the
blood of the ancestor intestate - for there
would be no such persons - It may be said
that notwithstanding this, the feudal sense
may be a just one - for the estate may
have come from some collaterals relations
as an Uncle or a Brother - & that it is in-
tended when the estate comes from them
that it should on failure of brothers &c of the
intestate & their leg. Repr. to go to some lineal
descendt of him from whom the estate came
as for instance the lineal descendts of an Uncle
& their leg. Repr. However this might be sup-
posed to be the case if the terms were no

descents
where used only when providing for the
next of kin. But it proceeds farther
& says the estate shall go to the brothers
& sisters of the intestate & of the blood
of the ancestor from whom it came. But
in the feudal sense of the words the in-
testate could have no such brothers &
sisters when the estate came from an Un-
cle or Brother for his brothers & sisters
could none of them be Lineal Descend-
ants of such Uncle or Brother. In all
such cases there there would be no persons
to take - at least the brothers & sisters of the
intestate would be excluded manifestly
contrary to the intention of the Stat -

Of the Blood of the ancestor
must mean something more than mere-
ly some lineal descendant of the intes-
tate it being demonstrated that the Stat-
ute did not intend that it should be used
in the confined sense appropriated to
it under the Feudal System - I cannot
conceive of any other meaning that can
with propriety be applied to it than
this - That the person entitled to inherit
must be related to the person from whom the

and then it is for this purpose immaterial whether he be a Father or an Uncle if related he is of the blood of such ancestor. This I apprehend must be the true meaning of the terms since it cannot mean those only who are descended from him. Admitting this construction to be a just one there is a tautology in this clause of the Stat. for the statute is to go to the next of kin to, & of the blood of the ancestor &c which is the same thing as to say "to such person who is next of kin to such ancestor & at the same time related to him" or in other words "to the next of kin of such ancestor who is next of kin to him". That "of kin to him" and "of his blood mean the same thing we have the opinion of the English lawyers who translated the Latin Stat. of Hen. where administration is directed to be given or granted "to the next of kin", which in the original words is "proximo de sanguine" In this case I will hazard a conjecture that there has been an omission of the words "the intestate" to be inserted immediately after the words "next of kin to

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which will rescue the Stat. from the imputation of tautology — The Stat. then will stand thus "to the next of kin to the intestate & of the blood of the ancestor from whom it descended" — As the Stat. had before directed that the estate should descend to the brothers & sisters of the intestate of the blood of the ancestor &c. so now on the failure of such relations of the intestate the next object in view is the next of kin to the intestate with the same qualification of being of the blood of the ancestor — It is as much as to say "If we can't find a brother or sister with this qualific^n we will select it's next relation who has that qualific^n" — In addition to this when we examine the subsequent parts of the Stat. we shall find that when other estates besides ancestral such estates are to be distributed among the brothers & sisters of the intestate as the first objects of its bounty & upon failure of them it next contemplates the nearest of kin to the intestate — Therefore to preserve an analogy in all parts of the Stat. it would seem as if the Stat. intended to contemplate the same objects of its bounty in this clause of the

Stat. as in other parts, only requiring to answer a particular purpose that such persons should have the qualification of being of the blood of" or in other words "of kin to" the ancestor &c— or if the words "to" & "of" were erased the Stat would then have the construction contended for— For it has been determined that when the Stat speaks of the next of kin it uniformly means the next of kin to the intestate— Of that clause of the Stat. that directs "that all the estate except ancestral shall in the first place descend to brothers &c of the whole blood & their leg. Repr. & on failure of such heirs to his parents or on failure of parents to the brothers &c of the half blood & if there are no persons of this description to the next of kin to the intestate & their leg. Repr.

I apprehend it will be found that the terms leg. Repr. in the last clause of this Stat are misplaced sought to have been inserted next after brothers &c of the half blood— for to suffer them to remain in the place in which they are printed in the Stat Book will not only destroy destroy the symmetry of the Stat but manifestly oppose the intention of the Legislature & render

Descents

The Statutes ~~for former part of this clause~~ are contradictory & contradictory to itself — Where we find the Stat. in the former part of this clause providing for the brothers &c of the inter. d. the whole blood & their leg. Repr. we should expect that when provision was made for the brothers &c of the ½ blood that a like provision would be made for their representatives. but the Stat. as now penned fully part of this & makes provision for the brothers &c of the ½ blood without mentioning their leg. Repr. — So in the case put "of A's death who purchased an estate with his own money & having left neither childn nor their leg. Repr. or brothers &c or their Repr. of the whole blood or lastly any parents; but Sam & Sally Rowe brothers &c of the ½ blood the Stat. provides that Sam. & Sally shall take just estate, but if Sam is dead leaving childn Sally will take the estate to the exclusion her brothers childn for they are not provided for by the Stat. as it now stands.

It can hardly be supposed that the Legislature meant to exclude Sam's childn for had Sam & Sally been Hilrs of the whole blood Sam's childn would have taken an equal

share with Sally & to preserve the Symmetry of the Stat we should expect the same Provision made for the Rep. of the ya blood as was made for those of the whole blood & by the transposition of the words "and their legal rep." as proposed this provision will be effected for in that case the Stat. will read "to the brothers of the ya blood & their leg Rep. & for want of these to the next of kin" — And it ought to be remarked that in the former clause of the Stat. respecting ancestral estate when it provides for brothers & sisters of the inter. of the whole blood of the ancestor from &c, it also provides for their legal rep. — We may therefore reasonably presume that when in another part of the Stat where provision is made for brothers &c that it is also made for their legal representatives & that also in this part where provision is made for brothers & sisters like care would be taken of their Representatives — Besides it seems extraordinary that the Stat should go on & make provision for relations more remote than brothers & sisters, & then provide not only for them but their leg. Rep. & neglect to make provision for the Rep. of such brothers & sisters —

Descents

Let the words remain where they are & the stat: is plainly repugnant to itself - for no reason is made that there shall be no representation after brothers & sisters childn: i.e. if J S is dead leaving brothers & sisters childn such childn may take with their uncles, but if all the brothers are dead leaving childn & some of their childn leaving childn such last childn shall be excluded from the inheritance, no representation being admitted but among brothers & sisters childn for example J S died leaving his brothers Tom & Harry they inherit equally & if Tom is dead leaving Geo: he takes by repn: what his father would have taken but supp. Geo: also dead leaving a son Alfred such son could not take with Harry for this would be to take by repn more remote than what is provided for & indeed it is somewhat forbidden - And the case would have been the same if Harry was dead leaving a daughter Susan - She would have taken the whole of her Uncle John Fuller's estate to the exclusion of Alfred for representation is not admitted among collaterals farther than brothers & sisters childn But to let in Alfred would carry the right of repn to the grandchildn which is forbidden by

the Stat. But if we admit that the words legal Representatives are rightly placed it will let in Alfred to inherit with Susan which is expressly forbidden in another clause of the Stat. We will suppose Tom & Harry to be brothers of the ly blood & both dead & for want of such persons it descends to Geo: & Susan for they are next of kin & if Geo: is dead then must the estate descend to the next of kin & their legal Rep. id est to Susan & Alfred who is the leg. Rep. of Geo: Thus that which is forbidden in one branch of the Stat. is effected in another & rep. carried on in my Collaterals a direct impertinent But if we suppose the terms misplaced the Stat. will read thus "to brothers & sisters of the ly blood & their leg. Rep. & for want of such to the next of kin" in such case Tom & Harry would inherit equally — Tom being dead his son Geo: his leg. Rep. would inherit equally with their uncle Harry & admitting Harry to be dead would inherit equally with his cousin Susan but Geo: being dead Susan would inherit the whole as being next of kin & Alfred would be excluded for rep.ⁿ cannot go further than brothers & sisters child.ⁿ & Alfred is the grand child of such brother — If indeed Susan was dead

descents
When Alfred would inherit not in right of representation but by being next of kin & if Susan left a daughter Polly, Alfred & Polly would inherit equal shares being alike near of kin to the intestate &c—

The same rule observed among collaterals as that between brothers & sisters children. If they are more remote than such children there can be no reps as where the only relatives of J.S were Charles his uncle & Edmund a son of a dead Uncle In such case Edmund is excluded being in the 4th degree that is one degree more remote than brothers & sisters children being in the same degree as Alfred whom we have seen would take by representation; but if Charles was dead Edmund would take as being next of kin and for the same reason that uncles & aunts share equally with nephews & nieces when they cannot take by representation Edmund would share the estate with Alfred & Polly per capitas each 1/3 —

That the doctrine here stated to show that the words "equal Rep." are misplaced is just so a case in Vesey 393. where the question was whether the children of the Uncle & the brothers grandchildren were in equal degree

Descents

it was determined that they were & that they should take equal shares of the estate of the intestate — See Peck's case 1st P.Wms where it was determined that a brother's grandchild could not inherit with a brothers child. See also Bowers case 1 P.Wms where it was determined also that an aunts son could not inherit with an uncle —

"Of that clause in our Stat. that "provides that on failure of lineal de- "scendants the estate shall go to the brothers "& sisters & their leg. Resp. —

It will be found upon examin. of the cases which have arisen in the Exch. under the Stat of distributions where the terms leg. Resp. are used & from whence we derived them & introduced them into our stat. that the childn of the brothers & sisters of the intestate do not in all cases take as Resp. to their Parents, that is, they do not take by representation what their parents would have taken — As for instance Suppose J.S to have died leaving his brother Tom & his nephews Bob & Peter the sons of his broth- er Harry who died in the life time of J.S In such case Bob & Peter would take a moi-

moiety of the estate by right of Rep. descents taking in right of their father Harry what he would have taken but when all the old stock of the next of kin to the intestate are dead before the intestate the children or lineal descendants no longer take by rep. but in their own right as next of kin. If in the case put Tom had also been dead leaving a son James James would take one moiety of the estate as rep. to his father but the old stock being dead, that is, Tom & Harry brothers of J.S. their children no longer take by rep. but in their own right as next of kin to J.S. They take equal shares. But where there are any of the old stock living whilst others are dead leaving children they take per stirpes.

That this idea is supported by the Eng. decisions see the case of Davis 3° Wms 50 - where the intest. left only nephews & nieces viz - one nephew by a brother & 3 nephews & 2 nieces by a sister. In this case the decree was that they should take per capita & the Chancellor observed that the claimants did not take by rep. but as next of kin, & that it would

2 Vesey
have been otherwise had one brother or
sister been living — See also the case of Loyd & Sims
2 Vesey 213.

From this construction of the term
Rep. there necessarily follows this con-
sequence that if there are any relatives of
J.S. as near of kin as brothers & sisters child-
where the right of Repn has ceased by the
death of all the brothers & sisters in J.S. life then
such children will only take equally with such
relatives — The nephews & nieces of the intest
as in the case of Tom & Harris death before J.S
leaving them viz. James & Peter, Bob & their
Uncle Geo: In such case as James Peter & Bob
do not take by Repn but as next of kin & as
Geo: their great Uncle is in the same degree
of kindred to the intestate with themselves
Geo: must take with them —

That this idea is justified by an
authority see the case before cited in 2 Ves. 213
& 1 Atk. 454.

It will not only happen that where
the right of Repn has ceased that Uncles & Aunts
will be let in to share equally with nephews
but if there should be any person in a nearer
degree to J.S than they are, they will be excluded

for in the case just of the death of Tom & Harris leaving their child[n] James, Peter & Prot if Solomon Stiles the Grandfather be alive he will take the whole estate for he is in the 2[d] degree, & child. His nephews are in the 3[d] — This is a necessary consequence of the doctrine laid down in the case cited that the nephews do not take jure representationis. but as next of kin Salk 251. 2 Vez. 213.

We have already seen that the aunt & nephew stand upon an equal footing. that if the nephews can take where there are no brothers & sisters, so also can an aunt, for where one takes so does the other both being in the 3[d] degree — If therefore the aunt is excluded by the grandmother who is in the 2[d] degree so must nephews & nieces be excluded for the same reason

It has been mentioned that our Stat. gives to brothers & sisters whether of the whole or half blood a priority to all other persons in equal degree — for by the express words of the Stat they are to take before other kindred, only that Parents take

before brothers & sisters ~~brother of the whole~~ of the
~~1/2~~ blood which is no more than what
they would have done had there been
no priority mentioned by that - for if our
Stat had like that of Ch. 2 - distributed the
estate to the next of kin parents would
have first taken as being in the 1st deg. whilst
brothers & sisters are in the 2d - But all the grand
parents are in the 2d degree as well as brothers
& sisters our Stat. gives the preference to brothers
& so that no question of this kind can arise
under our Stat. between a gr. father & brother
or sister tho this has been a subject of litiga-
tion in the Eng. Cts

We have seen that the gr. mother
is preferred to the aunt she being in the 2d
degree while the aunt is in the 3d - for the
same reason the gr. father ought to share
equally with the brother & Sr. being in the
same degree -

We have likewise seen that an
aunt inherits equally with nephews & nie-
ces when they do not stand in loco parentis
because they are in equal degree - for the same
reason an uncle's child & brother's or sister's child inherit
equally both being in the 4 degree -

Decents

It seems in all those cases the rules ~~[illegible]~~ prescribed by the Stat. have been sacredly adhered to, & when they should be disregarded in the instance of a Gd father & brother I have found no reason assigned — As no such question can arise under our Stat. yet it may be important for us to know that those cases are to be considd as precedents founded in principle, for the reason of them will extend to cases that may happen with us — for the same reason that a brother is preferred to a Gd father, a nephew or niece should be preferred to an aunt & such case is not provided for by our Stat. only in those cases when they stand in loco parentis —

With respect to the Stat of James 2d which places a brother upon a footing with brothers & sisters, it may not be amiss to observe that altho' she is to take only an equal share with them, yet it has been determined that where there is no brother or sister or Repr. of them altho there may be other claimants in

equal degree with such brother as a 3d take
be yet the shall take the whole as being
next of kin in the 1st deg. as she would have
done before the makg. of the Stat. when the
father was not living altho there were
brothers & sisters —

In the case of Stanley vs Stanley 1 Ves. 458
there being no brothers or sisters but nieces
of a dec.d brother & a mother, it was determined
by Lord Hardwicke that the niece should
take with the mother — The principle upon
which such determination was founded
seems very questionable for there being no
brothers & sisters or their leg. Rep. the niece could
not take by rep.n the brothers & being dead
if therefore they could take it must be in
their own right as next of kin — Such a de
termination is wholly opposed to the current
of decisions respecting rep.n unless it is to be
reconciled to them on this ground, that the
mother by the omnipotence of a legislative
act is made as a brother & sister & at the
same time becomes a constituent part of the
old stock in this view of the case the decis
ion was perfectly ~~right~~ right — for part of the
old stock being alive the nieces took by rep.n

& stood in loco parentis — And upon the same ground according to the decision of Evelyn & Evelyn if she is consid^d as a brother & she would take the whole from a gr^d father altho she is in the same degree —

In the construction of the Stat of Car^e it was always understood that where there was a father and mother the whole vested in the father not indeed as being nearer of kin but as that Stat was conversant merely about personal prop^y if the share should vest in the mother it would at the same instant become the father's — It might therefore be as well to suppose it in the first instance to vest in the father — But where our Stat which is conversant about real as well as personal prop^y gives the estate to parents upon failure of the brothers & sisters of the whole blood I apprehend a very different construction would be given since the mother altho a feme covert is as capable of accepting real prop^y as the father she ought therefore to be considered as a tenant in common with the father As to the personal prop^y thus given by the Stat it might be consid^d as vesting only in the father with the same propriety in this country as in England The End

An Essay on Bills of Exchange

By Tapping Reeve Esquire

A Bill of Exchange is nothing more than a written request from one to another to pay to a 3rd person a sum of money. The maker of the Bill is called the drawer, and the person on whom it is drawn drawee, & the person to whom it is payable the payee. It is regulated by the Law Merchant which is the general usage of Merchants in the Commercial nations of Europe & their Asiatic, African & American Colonies & also among the Merchants of the United States of America.

This Law Mercht is recognized by Courts as the law of the land & is not provable by the testimony of any person whatever. It is true the Law Mercht is not universally the same in every country. And wherever a usage prevails in one country variant from the general usage of nations, this local usage is the same to the Law Mercht as a custom is to Com. Law & this like other customs is provable by witnesses; ~~and is~~

It is to be presumed that the drawee

has received money of the Payee & that the drawee has the effects of the Drawer in his hands to the amount of the Bill if he accepts it But this is by no means necessary to the validity of the Bill — for whether the drawer has rec^d money or not, or whether the drawee has effects of the drawer or not, the drawer is liable to the Payee if the drawee does not accept the Bill, or has accepted it & refuses to pay it — When the Payee has a Bill & presents it for acceptance if the drawee refuses to accept it, it then becomes the duty of the Payee to give the drawer notice of such refusal that the drawer may have an opportunity to withdraw his effects if he had any in the drawee's hands, & by means of this notice the drawer becomes liable to the Payee in an action of debt or indebitatus Assumpsit. If the Bill is accepted & not paid according to the tenor of the Bill the Payee must give the drawer notice of the nonpayment, that he may charge the drawee as in case of non acceptance — and if this notice be not seasonably given any loss occasioned by the removal or Bankruptcy of the drawee must

fall upon the payee for in case of non-acceptance the neglect of the payee in not giving the drawer notice is consid. as a discharge from the payee to the drawer for he might have withdrawn his effects in the hands of the drawee or in case of non paymt the payee is consid as giving credit to the drawee & has an action on the case against the drawee & by giving notice of non paymt he has an action against the drawer & it is optional with him against whom he pursues his remedy. And if he elects to sue one in preference to the other & cannot obtain payment of the one whom he sues he may resort to the other. The mode of giving notice to the drawer of a refusal to accept or to pay after after acceptance is ordinarily by protesting the Bill which is done in writing before a Notary Public which protest is entered by the Notary to have been made. If there be no Notary the same is done in the presence of two or more respectable inhabitants & by them certified which protest is sent back to the drawer by the first post after the time of paymt and when this mode

of notice is pursued not only the contents of the Bill as in Com. Bills but the damage sustained thereby, in most countries estimated at 20£ \% Cent are recoverable. If the Bill be accepted to be paid agreeable to the tenor of it and not paid at the day of paym.t there are by the Law Mercht 3 days allowed called days of grace. If the Bill be drawn payable in a month & accepted payable in six months this shall bind the acceptor according to his acceptance. & yet if the Payee would charge the drawer he must get the Bill protested for non acceptance The Law is the same when the drawee accepts the Bill for part & refuses to accept for the remainder. Whatever opinion may have prevailed in Courts respecting parol acceptance it is now settled that such an acceptance is binding. Any words which indicate the drawee's assent to pay the Bill is an acceptance & altho' in other contracts the Law requires that there should be a consideration or the evidence of such consideration

from the acknowledgment of "value rec'd"
yet in the case of Bills of Exchange if
there be no consideration for the engagement
or it be upon a partial consideration the
person contracting is bound. When a Bill
is made payable to the payee or order the
payee may endorse it over to another &
the property becomes the indorsee's who has
the same remedy against the Drawee & Drawer
as the payee had & also against the indor-
sor who is consid^d as making a new Bill—
If there are ever so many indorsors he may
have his remedy against either whom he
elects & they in their turn against any
prior indorsor— Whatever discordant opin-
ions may be found in the Books it is now
settled that an indorsee may sue any indor
sor without making any demand upon
the drawer or endeavoring to recover the
money of him. 2 Burr. 674. When an in-
dorsee sues an indorsor, he need not prove
the drawer's hand writing— for if it be forged
the indorsor is liable Salk 127. When a
Bill has been accepted, it is the last indorsee

who has a right to the money & can sue the drawer - but if a prior indorsee pay the last indorsee he may sue the drawer. If an indorsee or payee accepts any part of the Bill of the drawee he can never resort to the drawer or indorsor. It is not in the power of the payee to indorse part of the Bill so as to subject the drawer to more actions than one, but if such indorsee will acknowledge satisfaction of the remainder upon the Bill such indorsement is good Salk 65. An indorsement in blank with only the indorsor's name puts into the power of the holder to fill it up as he pleases - either with an assignment of the Bill, or a power of attorney & whatever it be the indorsor is concluded thereby Salk 128. But untill the Blank is filled up it is no evidence of the property Salk 130. A Bill "to one or bearer" is not assignable Salk 125. If such Bill be found or stolen it vests no property in the finder or thief - yet if the drawee pay such Bill it shall be allowed him by the Drawer & if such finder or thief pass the Bill to another person who is not privy to the writing a property in the Bill is acquired in the transfer. If a drawee refuses to accept the Bill may be accepted by a person on whom it is not drawn for the honor of the Drawer & such acceptance is binding. In this case the Bill must be protested so that the drawer may be charged by the payee & by

the acceptor. In some instances the drawer may have an action on the case against the Drawee as if the latter accepts & afterwards refuses to pay & the drawer has been obliged to discharge the payee — for the acceptance of the drawee is prima facie evidence of his having the drawers property in his hands to that amount & this by the custom of Merch^ts subjects the Drawee to the Drawer But altho acceptance is such prima facie evidence yet if it appear that the Drawee has not the effects of the drawer the drawer will fail of a recovery. If the acceptance is for the honor of the drawer no action is maintainable by him against ~~the Drawee~~ acceptor upon the custom — for from such acceptance no presumption arises that the drawee had effects in his hands — A Bill may be indorsed to the drawer & the indorsee may maintain an action against the drawee after acceptance — on the other hand the Drawee who has paid the Bill may have his action against the drawer for so much mony laid out at his request — But if it appear in evidence that the drawee at the time of paymt had in hands property of the drawer to the amount of the Bill he will not prevail. When the drawee accepts & the Bill is indorsed the indorsee may maintain an action against the drawee altho the Drawer's name was forged — but the payee could maintain no action for he would be receiving benefit for his own wrong, yet an innocent indorsee is not to suffer who probably rec^d it upon the evidence of the acceptor who is supposed to be acquainted with the handwriting of the drawer — Where the holder

Bills of Exchange

of a Bill has sued an indorser & taken his body in exec^n which proved insuffict to recover the money due - altho he set such indorser at liberty, he may yet resort to any other indorser.

A note "to the Bearer" is a negotiable instrument tho' not a Bill of Exchange - for every Bill of Exchange must be made payable "to order" - ~~But yet it appears on a~~ ~~special point whether it be good without an~~ ~~acknowledgment in the note or "value rec^d" tho~~ ~~the better opinion is that this is not necessa~~ ~~ry~~ - When an indorsee has rec^d part of the sum of an indorser, he shall notwithstanding receive the whole from the drawer. A Bill made out of a particular fund is no Bill of Exchange nor one payable upon a future uncertain contingency.

Finis

Essay on the liability of infants for their Contracts.

By Tapping Reeve Esqr. of Litchfield.

By the term infancy in our Law is understood a person under the age of 21 years. During the period of infancy the infant is subjected to the authority of his Master, parent or Guardian as the case may be — his services belong to them & it is generally true that he cannot by his contract bind himself in such a manner as not to have it in his power to avoid those contracts if he pleases to avoid them. The contracts of others with him shall bind them even when there is no other consideration than the infants contract — Altho' an infant is not liable upon his contracts yet he is liable both civiliter and criminaliter for his torts. If an infant at the age of seven years or under do that which in others would be an offence, he is not liable to punishment, for the presumption of law is that he has not understanding sufficient to commit a crime; against which presumption no proof is admissible. Between the age of 7 & 14 the presumption is that for want of understanding he cannot be an offender; but evidence is admit

sible to remove this presumption; & if he be found dolicapax he shall be punished as a criminal in this case malitia supplens ætatem. Between 14 & 21 infancy can in no case be any excuse. The same rule obtains as to his liability for any injury done by him & he is liable to an action of fraud, or indictable as a cheat. Altho an infant may avoid his contracts generally, yet he shall be bound when those contracts are for necessaries which are Physick, Clothing, Food & Instruction and those must be such as are suitable to the infants rank in life, which it is reasonable to suppose that a person under his circumstances should purchase for it may be very necessary that an infant who has no parent, Master or Guardian, or who by the providence of God is separated from them so that he can make no application to them for relief, to contract for his comfortable subsistence; for those things which whilst with them under their care & protection would not be necessary for them to contract for, since from them he would receive all that was necessary for him to receive. Or when a child is so treated by an unnatural parent or cruel master that a comfortable

& reasonable subsistence is denied him, the law will substantiate his contracts for necessaries - that is the Law puts it out of the infants power to refuse payment for necessaries afforded him under such circumstances as have been mentioned. And even in this case whenever his contract is so managed that the consideration of the contract from the nature of the security cannot be enquired into, such security is void. If the Law was otherwise the infant might be compelled to pay much more than a reasonable price for his necessaries & thus thro' indiscretion ruin himself. Hence we find that the infant cannot bind himself in a bond with a penalty for in this case the Court cannot enquire into the consideration, but judgement must be rendered for the whole sum in the condition with interest, when perhaps the real worth of the necessaries was not half so much as the sum contained in the condition. This I conceive to be the true reason why a Bond with a penalty does not bind the infant - and not the reason commonly mentioned in the Books "That it cannot be for the advantage of the infant to subject himself to a penalty," as the the Court are vested with power to chance

down to the principal sum & interest. And however this may be a reason in Courts of Law before the Statute of Ann vesting the Court with this power of chancering since that it has certainly ceased to be a reason. —
Upon this ground the consideration of a Single Bill may be enquired into & altho the Bill acknowledges a debt of 50£ yet the judgement may be for 5£ only if it be found that the necessaries for which the Bill was given were of no greater value. We find also an infant is not bound by a note of hand negotiable; for the consideration of such a Note cannot be enquired into — he is however bound by a note not negotiable for in this case the consideration may be enquired into. So again he is not bound by a bill of exchange when no inquiry can be made respecting the consideration. No action is maintainable against an infant upon an Insimul computasset and altho it is true that an Insimul computasset may be enquired into, the reason of the case seems to be that the only consideration set up as a ground of the promise is an account stated where the law does not consider the infant as having sufficient discretion to state an account. In all these cases

tho the security is void yet the contract remains good. Thus stands the English Law respecting the Contracts of infants. In no case shall the infant be liable for more than the value of the necessaries purchased, tho any indirection in giving a security which from the nature of it would prevent any inquiry into the nature of the necessaries. And yet in no case shall it be in his power to avoid the payment of the just value of the necessaries. That infants should be bound to pay the real value of the necessaries is an idea that has been adopted by our Courts; and that they should not be obliged to pay an exorbitant price for those necessaries is certainly to be wished & must on all hands be acknowledged to be a doctrine highly reasonable. But would not the doctrine totally destroy the note of an infant in this Country? A Note of hand is treated by us as a bond with a penalty. ~~as it is treated in England~~ the consideration cannot be enquired into. Might not an infant in this way be subjected to great loss when he has indiscreetly given too great a price for necessaries & given his note for them & thus ~~subjected himself~~ fall a sacrifice to his own in-

discretion & the avarice of the Shark[illegible] which most undoubtedly the Law means to protect him against? So an infants note to be considered void & no action maintainable thereon altho given for necessaries? This would be contrary to practice & yet the Law can never afford that protection to infants it means to do unless the idea is admitted; or when infancy is plead the rule should be relaxed respecting the enquiry into the consideration & finding the full value of the necessaries without any reflect to the sum promised in the note. The adoption of this method of rejecting the note & compelling the creditor to resort to the original contract where the value of the article sold may be ascertained by the Jurors, will preserve entire the principles of Law in compelling the infant to pay the just value of the necessaries and at the same time prevent his suffering any injury from his own indiscretions. It is the more necessary to adopt the method proposed when we take into consideration that the articles themselves which are necessaries do not convey to us the full legal import of the term — for that which is necessary for one infant may not be so to another. The circumstances of the infant must always be taken into consideration; for whenever the infant is

under the care of a Parent, Master or Guardian & that government is duly exercised no contracts for the articles termed necessaries shall bind the infant tho they were not necessary for him in his situation. But when the infant in the course of human affairs is separated from parent & cannot be the subject of their government & protection, or when an unnatural Parent or cruel Master, or avaricious Guardian shall so conduct towards an infant, that a comfortable subsistence is denied him, or if they should be incapable of affording that subsistence, the infants contracts for necessaries should bind him. This may frequently happen. A minor is liable to be called into the field in the time of war & in a distant state separated from his connections & cannot resort to them for relief let his circumstances be ever so distressing. The same may happen when on a journey upon business or for the recovery of his health. And the case is not altered if the infant voluntarily leaves his parent with or without reason for it is the situation that gives efficacy to the contract without any reference to the preceding cause which created that situation. Thus I conceive stands the Common Law. It is said by some that our Statute has made a material difference & considered all contracts of infants void, so that their contracts for necessaries are equally void as their

other contracts. I conceive the Statute has made no alteration, but is only a Statute in affirmance of the Common Law. The mode of expression made use of in the Statute is "All persons under the government of Parent, Master or Guardian shall be incapable of contracting." The true construction of which I conceive to be Such as are the Subjects of their actual government, for Such can never want to contract for themselves There was no occasion for trusting them. But this incapacity ought not to be extended to all Such as have parents Devise situated with respect to them that no government or protection can be afforded them. In this view of the matter it differs not from the Common Law unless it may be supposed that the Statute intended to protect minors from contracting when under the actual government of parents tho' however unduly that government was exercised. It can hardly be thought that So inhuman a provision could be the object of the Legislature or that the term "government" in this Statute was meant to extend to a government unduly exercised. I conceive Such a case ought to be considered as an exception which the Statute never intended to cover. Besides if the Statute had intended any thing of this kind & to cover

from the doctrine of necessaries, a doctrine at the time the Statute was enacted thoroughly understood, then terms more decisive of the intention of the act would have been made use of. This has long been the law of this State & yet the doctrine of necessaries has never been questioned. The Statute at the time it was made received no such construction as was subversive of this doctrine. A total silence in all our Courts respecting any alteration actually made or intended is confirmatory of the construction I contend for. In the revision of this Statute we find that after the statute has declared that "all persons under the government of Parent, Master &c are incapable of contracting unless licensed by their Parents &c" The statute enacts that "In such case the Parent Master or Guardian shall be bound thereby." The last clause was not the Statute previous to the revision. But I conceive that was no alteration of what the law before was, but a more express declaration of what the Statute intended - for the obscure manner in which the Statute was before expressed might lead to this construction that a person allowed by his Parent &c to contract was bound by that contract, which the Statute never intended. The license to contract added no efficacy to the contract so as to bind the person contracting but only operated so as to make the contract of the person thus licensed binding upon the Parent &c - or in other words, the contract of the mi

[illegible] void to [illegible] the contract of the
Statute & all of which is no more than de-
claratory of the Common Law. It might as well
be said that the Statute by the mode of expression
intended to destroy the Common Law doctrine,
"that an infant's promise was not absolutely
void but voidable" which I believe will readi-
ly obtain - it would be novel & introductory of
much confusion - For upon this idea suppose
a contract fairly made between a minor & an
adult - the minor purchases of the adult an arti-
cle at a fair price & pays the money - If the con-
tract is void the minor will be entitled to re-
cover back the money paid - no judgment could
be rendered against the minor (tho by default)
but what would be error in fact; & the whole
doctrine of an infant's confirming a contract
made during infancy, after he arrives at full
age, is at an end. For if it was void in its origi-
nal state no after promise could make it
otherwise than void - Neither upon this ground
would adults be bound by their contracts with
infants for a void act, as the livery of goods
by an infant where he notwithstanding is
entitled to recover the value of the goods in
trover, if the contract to deliver was void - &
this would never be a consideration.

And a void promise by an infant can 494
be considered sufficient to establish the pro-
mise of another person to him. All these
consequences would be the result of establishing
the idea "that an infants promise was abso-
lutely void" which are all opposed to the Gene-
ral received opinion which is founded upon
the idea that the promise of an infant is
voidable only. And altho we find expres-
sions in Law writers "that an infants con-
tract is void", nothing is meant more than
that such contracts may be avoided & this
construction has often been given to the
word "void" when used in a Statute as an Eng-
lish Statute which declares all leases by
tenants in tail for longer term than the life
of such tenant, to be void. This is construed not
to mean "absolutely void" but only "voidable by
the heir in tail after the decease of the tenant-
Upon this ground it is that by the Eng. Law when an
infant has executed a Bond he cannot plead
'non est factum' but must avoid it by
pleading specially whereas a feme covert may
plead non est factum for her incapacity
to bind herself is such that it renders all her
acts absolutely void. Altho I conceive it to be
generally true that the acts of an infant are
only voidable, yet I can easily imagine a case

where I conceive their acts void - for at the same time that it protects their indiscretion from injury, it enables them to do binding acts for their advantage, the design of privilege to protect infants - So that object therefore must all the rules respecting it be directed. Wherever then a case arises in which an infant cannot receive the protection designed him unless his act is consid^d void, I conceive it ought to be so considered. Many acts of an infant besides contracts for necessaries are considered in Law as binding upon ~~them~~ him - for whenever an infant does a right act which the Law will compel him to do, it shall bind him - As if he should make equal partition, an act which the Law may compel him to do, this act is binding. So where a lease is made to A. & his assignees for a terms of time & for a yearly rent A. assigns to B. an infant who enters upon the term he is bound to pay this rent - And when the infant is barely a trustee & executes the trust he cannot avoid such act, for in Equity he is so compelled to do - As where an infant executor duly receives, or quits, pays & administers the assets - Or suppose A. is a Mortgagee in fee & dies, the mortga-

ged premises descend to B. his heir & an infant
the Mortgagor pays the mortgaged premises to the
executor by which means he becomes entitled
to the land & B the infant conveys to the Mort
gagor, the conveyance is binding upon him
for by Law he was compelled to convey. And
by the Eng. Law the Assignment of dower by an
infant binds him, for he was by law compel
lable to assign the dower. In trials where in
fancy is plead & necessaries replied, it frequen
tly becomes a subject of enquiry What are neces
saries? for as I observed before the situation of
an infant is always to be taken into consid
eration. When an infant lives with a parent
who provides the articles termed necessaries, the
infant is not bound. Necessaries of an infants
wife & children have been adjudged his neces
saries. Money lent to an infant to be laid out
in necessaries, has been adjudged not necessaries
unless the loaner took care to see that the mo
ney was laid out for necessaries. But why
should it not be considered as 'necessaries' without
the loaner's seeing it actually laid out for ne
cessaries? On the Replication it has been deter
mined that the replying "necessaries" generally is
insufficient, without pointing out what those
necessaries are. But since what are necessaries
& what are not is manifestly a question of

14. Law, I should conceive that pointing them out in the Replication would be the most eligible method; as it would preserve the question of Law to the Court, the constitutional forum for the trial of all Legal Questions. —— Finis

See Buller page 155 182 — It would seem on first view that a single bond of an infant was void but remark that was an action of assumpsit whereas it ought to have been brought on the bond & the promise made after age given in evidence ——

In the subs: of mon: liab: examb. the case of [illegible] many being found on the cov: of seisin before damnification —— Ld Prince &c.

An Essay written at the Office of Tapping Reeve Esqr Litchfield Decemr. A. 1798

Baron and Feme

As it respects the liability of the husband for the contracts of his wife & for her torts — When she is liable with him & when she is liable alone —

Legislators have found it necessary to consider husband & Wife one person. It was found however that the 2 parts of which this person was composed did not always appear to have precisely the same uniform notion. On the contrary, when both were employed in one affair there frequently seemed to be 2 contending dispositions bearing some resemblance to the 2 opposite propensities which, according to Pythagoras influence the human heart the one to virtue, the other to vice — differing however in one respect, the 2 parts of the person being unfortunately provided with organs of speech which sometimes carried their debates to such extraordinary heights, particularly upon the question "Which should be commander in chief of their transactions?"

that the peace of families & of society was highly disturbed — In order therefore to preserve a proper degree of harmony it became expedient to vest one with the principal executive authority. And as the husband by reason of the superior strength of his constitution was conceived to be best calculated to transact business, it was determined that the executive authority should vest in this part of the person, with full power to contract & be contracted with to sue & be sued, in short to represent the whole person in all external affairs — leaving to the silent intrigues of the female part to operate in secret & effect what they would. The husband therefore was always supposed to contract & when the wife contracted for any even the smallest, necessary, it was by the husbands impulse, the law being always careful to presume that it was by his command, or at least by his assent. For it made no difference as to the source which contracted he being

always liable as long as their behaviour corresponded with that darling unity which the law was pleased to predicate of them—

After having thus related the origin of the husb^d liability for the wife's contracts, & will proceed, to distinguish the several cases of his liability. The husb^d is liable, for all the wife's contracts made with the wife, where covered by before marriage, provided the suit be ~~not~~ before the determination of the coverture. A false maxim formerly obtained—"That the husb^d was bound to pay none of the wife's debts contracted before marriage. This idea compared with the other principle of law which throws all the Wife's property into the husb^d hands appears very unreasonable—For as the Wife has no command over property, it immediately on marriage vesting in the husb^d it is evident she cannot be liable—But creditors ought not to be defrauded—somebody must be liable; & it is reasonable that this liability should

Law upon that property which the husband by operation of law has been taken away from her Wife possessed when she was trusted.- This property is in the husb^d hands he ought therefore to be liable- This old maxim however is hardly worthy of a refutation. It has long since fallen with much other rubbish of ancient Law into it's merited oblivion. The Law now is that the husb^d runs his risk in marrying- if the wife has property, it is his. If she is involved in debt, he becomes involved with her- or as the marriage-contract expresses it he takes her "for better, for worse"- This Maxim of the husb^ds liability for the wifes contracts before marriage is an universal one- It embraces all the cases that can arise. But with respect to the husb^ds liability for the wifes contracts after marriage, the law is a little more complicated being crowded with absurd, unjust & ridiculous presumptions, which have no foundation in reason and are entirely derogatory to that Dignity that

The Law ought ever to presume.
The rule is that the husband is liable
only where there is an express or im-
plied assent of his. Tho this Maxim
is twisted & tortured & every way to
embrace all possible cases, it will on
examination be found extremely in-
adequate — Where there is an express
assent the husband ~~ought not~~ is unquestion-
ably liable. But let us examine a
moment the evidence that English
Lawyers offer for this implied as-
sent. Where the husband allows his
Wife generally to contract for him,
her contracts are binding upon him,
or where this license is not general
yet if he suffers her to contract for
him in a certain line of busi-
ness, her contracts in this business
are equally binding upon him
as his own — So far the evidence
of his implied assent is clear.
In this case there is a fair presump-
tion that he ought to be liable.

the wife must run in debt for articles for family use who it may not be usual for her to purchase them the husb[d] is liable — for it is presumed "that any reasonable being would wish to have his family provided for" — Here the evidence of the agent begins to grow a little obscure — but if there was no greater absurdity in any of their presumptions they might be borne with — We will now suppose the Wife is turned out of Doors by the husb[d], he is still liable for her contracts in necessaries — the law here introducing the strained Presumption that no man (even if he had a Petition to kick his Wife out of Doors) could possibly be so hard hearted & cruel as to refuse her the necessaries of life — That may be the case, but it strikes me that if the husb[d] had proceeded to

far as to drive his wife out of doors, the would conceive it a tolerable decent hint that he was willing to deprive her of any thing — and contrary to what the law presumes I believe she would be apt to presume "that "her husb^d had no idea of assenting "to her bargains"

We have not yet arrived quite at the pitch of their inconsistency — Let us go one step farther & we shall may mark out the ~~boundary~~ the ne plus ultra of ~~human~~ absurdity — When the husb^d in sound mind absolutely prohibits ~~his wife~~ any persons trusting his Wife, even in this case where there is as express a dissent as Language will admit of the last will must stir an ~~a great~~ Here in a solemn farce the faculties of the husb^d mind are to be so disordered that he is directly made a Lunatick — The mode of proving this lunacy is

a little curious - It is taken for granted that human nature is so perfect "that no man in his senses could help "but assent to the contracts of his wife "for necessaries"

The ultimate design of the law is well enough - It is founded in the good policy that when the husband turns his wife out of doors, or unreasonably refuses her the proper necessaries of life she may herself contract for them upon his credit - But why should not the law express itself with boldness & simplicity "That the husband should be liable in these cases, his dissenting or assenting being altogether immaterial" - I can conceive of no necessity for this perversion of terms in order to discover an assent where there evidently can be none, & it seems to encourage a contracted mode of thinking which is degrading to reason

Where the Wife voluntarily elopes if the person trusting her had no notice of her elopement the husband is ~~on principle~~ liable, yet if the returns & he refuses to receive her, he again becomes liable. tho they can attempt to go common

The husband is liable for all the Wifes torts civiliter, committed before & after marriage — For her torts committed whilst sole she is liable with the husband & on his death she becomes liable alone — In case of torts after marriage committed in his company, they are in law his torts & he alone is liable at common law tho they were done against his will, according to some lawyers ~~except for the great crimes of treason & felony~~ For the Wifes torts criminaliter before marriage & those after marriage committed in the husbands absence, She alone is liable. But for those committed in his company he is liable alone — unless it be for the great crimes of treason & felony those torts which are called crimes & Qr. &c. for it is presumed if not appears to have been committed at yt. his will & the action should be brot agt. the wife alone.

that they must have been done by his compulsion as the wives while in their husbands presence loose all volition, & are such senseless machines that they can do no wrong unless by a mechanical impulse. This principle is nearly related to the notorious paradox beforementioned, in which the husbands assent is implied where his dissent is expressed —

Of Parent & Child.

As it respects their right of justification of each other in case of a Battery —

Parent & Child are allowed reciprocally to justify or assist each other in case of a Battery. It is however a duty incumbent on them when one is about to assist the other to enquire into the motives of the quarrel & if the motives are justifiable the Son may assist the

father & vice versa - If on the contrary the motives are unjustifiable, no violence is permitted to be used against their antagonist with impunity, the Law being careful to observe that they do not improve their privilege as an instrument to shelter themselves from justice - There may be instances however where the circumstances of the case will not admit of a discovery of the motives - As where the Son finds his father fighting & is ignorant of the motives he may assist his father so far as is necessary to preserve him from injury, but not so as to endanger his father's ~~life~~ ~~unless~~ ~~it turns out that~~ ~~even a mortal~~ ~~stroke~~ ~~must~~ ~~become~~ ~~out~~ ~~that~~ ~~his father was on the justifiable side~~ ~~the father was on the unjustifiable side~~ ~~the Son is not liable for the damages but the father~~ In such case if the Son had had the means of knowing the motives of the quarrel they being unwarrantable his privilege would not have protected him. When one of them is engaged on the defensive the case is clear they

have a mutual right to beat the offender without liability to pay damages— This reciprocal right of justification which the law allows parents & children appears to be a reasonable indulgence— as it encourages that natural affection which is expected as indispensible from persons so intimately connected by the bonds of nature—

Master & Servt—

As it respects the Masters liability for the Servants fraud—

As it is inconvenient & indeed impopible for men always to transact their busines personally, the law indulges them with the privilege of doing it by representation To prevent any mischief that might arise from this practice the Master is made liable for the Servts fraud It is a general rule that the Master shall be answerable for the Servants fraud practised when employed in

his business - The venerable Holt & I believe the judges have regarded this as a sacred Maxim liable to few, or no, exceptions, altho some of them have widely departed from it in their decisions - As the authorities upon this subject are totally irreconcileable, no governing principles can be drawn from them - We must therefore have recourse to particular decisions in order to come at the law -

There is the case of counterfeit jewels reported in Croke James 469 in which the Master was not made liable. It appeared that the Servant was sent by the Master from England to Barbary for the purpose of selling jewels - that they both knew them to be counterfeit - that the Servt asserting them to be good jewels, sold them for 700£ above their real value - and that the Master received from the Servt the money thus fraudulently obtained - But be-

because it did not appear that the servant was ordered to conceal them being counterfeit. The Master was not made answerable for the fraud It would seem by this authority as tho the Master cannot be liable unless where he commands or solicits the servants &c. to practice the fraud. This principle however will not hold good in a thousand other cases which are established to be law — as where a Merchants Clerk uses fraud in selling goods, the Master is liable whether it was by his command or not. But in case of the jewels this rule is entirely disregarded — an innocent stranger is imposed upon, defrauded of his money by a rogue in the immediate execution of his Masters business, and finally thro the caprice of the judges defeated in his remedy against the very man whom the Court and jury acknowledged to have received the money. As this case was attended with

no peculiar circumstances to take it out of the rule, the decision being founded entirely on the ground that the sent was not ordered to commit the fraud, it strikes me as being in the face of a maxim that ought to be held inviolable, as a deviation not warranted by a color of reason or necessity. Another case circumstanced exactly like this was determined the other way. A Merchants Factor beyond sea, sold a piece of silk for a different quality from what it in fact was. Here again it did not appear that the Master ordered him to cheat. But Justice Holt was of opinion "that as somebody "must be deceived by the deceit, it was "more reasonable that the man who "employed & put confidence in the "deceiver should bear the loss rather "than a stranger." In a case where the point came up whether Post Masters should be liable for their Servants fraud, it was decided that they should not on account of their having such a multiplicity of Servants

(This is confirmed by several late decisions) see D. Ray. 646 see Doug. & Cowper

in their employ. Holt however dissented, and if there is no more solid reason than that which influenced this decision, it is probable that Holt's opinion may yet prevail. It is obvious to see that a Master would be far more careful to employ faithful servants, if he was to be accountable for their frauds. It is determined that where ~~Masters~~ Servts cheat in selling their masters goods at Public auction the Master shall not be liable. There are many other cases where the Master is made liable. As where an innkeepers servt sells corrupt wine, or where a Goldsmith mixes dross in his plate & the servant sells it in either instance the Master is liable to an action on the case. Owners of vessels are also liable for the fraud of their Captains & mariners by the Common Law to the extent of the fraud, but by Statute to the extent

See Espin. 824 & 1 Term Rep. 11. Freight 5 94

of the value of the Vessel & freight

As there are no Statutes establishing any principles by which these cases are to be guided, the law is extremely fluctuating — & it appears a little extraordinary that a subject of so much importance should be left entirely with the whim of judges, the more extraordinary when we reflect that these judges have not only unnecessarily departed from the respectable old maxim of Common Law, but are continually running at right angles with their own adjudications — Smith

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Curious opinion of the Sup^r Ct Litchfield adjourn^d Ct Nov^r 1795 —

~~Appeal from Windham County~~ Incidentally in the cause

A deed of land was offered as Evidence — It was not introduced to by the title which it conveyed but came up incidentally — It was moved to prove the execution by comparing the hand writing of the witness with the Justice whom it was acknowledged — This was objected to on the ground that the best evidence ought to be produced & it did not appear but that the witnesses might have been had as they were out of the State — Judges Mitchel & Hemlington were for proving the hand writing of the Justice & not the witness — Judges Root considered both on the same footing but admitted neither to be proved — Adams agreed that they were on the same footing but was for admitting both to be proved he distinguished this case of the deed coming up incidentally & where the title to the land was in issue

How far defects in pleading may be aided or cured by a Verdict ——— by N. S. Esquire

After judgment upon issue to the jury the verdict may be arrested for the insufficiency of the declaration, plea, replication &c But all defects which would be fatal on demurrer are not causes for an arrest for they are said to be cured by the verdict of a Jury. Since then some defects are curable by verdict & others not the difficulty is to draw the line between these cases—

1. All irregularities in pleading as duplicity, ambiguity &c & the omission of immaterial facts are cured by verdict— and these defects are cured not because they are supposed to be supplied by proof to the jury as is sometimes pretended, but because it would be unreasonable to suffer one party to lead the other thro a trial and after a verdict obtained against him to unravel the whole business by reserving a mere formal objection to the end of the proceedings. A party therefore when he puts himself at issue to the jury is supposed to waive every objection, which he might have had to the form of the proceedings.

2. Where material facts are imperfectly stated— that is where they are stated, though not so fully as legal strictness requires, and which ~~perhaps~~ might have been bad on special demurrer, yet they are aided by verdict—

3. Also where material facts are totally omitted

if they are the necessary concomitants of any material fact laid in the declaration, the jury must necessarily have found the facts omitted & are therefore curable by their verdict—

To attend to the reason of these rules—
The reason why any of these imperfections or omissions are cured by verdict in the two last cases is that they are supposed to be proved to the jury & hence it follows that where there is an omission of any material fact which cannot be supposed to have been proved to the jury the defect cannot be cured by verdict— It is obvious that where material facts are imperfectly stated they are notwithstanding to be proved to the jury, for altho they are imperfectly stated, yet they are so far stated that the opposite party could know what he had to defend against— In many cases also facts which are totally omitted are so necessarily connected with other facts alledged in the declaration that those alledged cannot be proved without at the same time proving those which were omitted.— But where material facts are totally omitted and not thus connected with those stated, the party cannot go into the proof of them, for the opposite party has had no opportunity to prepare his defence against them. Therefore as it would be improper to prove a fact of that kind to the jury, there can be no presumption that it was proved, there can be none that they have found it— For instance, [illegible]

For inst. In Assumpsit where notice to the Dft is necessary to be stated if notice is stated but the time when & the place where omitted which are material facts, now as notice could not ordinarily be proved without at the same time proving the time & place, and therefore could not surprise the Dft. these may reasonably be presumed to have been proved to the jury— But suppose notice is totally omitted then there is no room left for presumption, for the reasons beforementioned. If a "corrupt agreement" is omitted in a plea of usury it is not cured by Verdict for the same reasons— Again if a consideration is omitted in Assumpsit it is not cured by verdict— An action for keeping an unruly Bull is not cured by verdict & so it is in every case where any fact essentially omitted science is omitted which makes a part of the gist of the action See Bac. Abr. 5 Vol. 316 page— Doug. 683— 2 Salk. 662 1 Salk 364-129 and other cases in the books where it has been adjudged that the Verdict cures defects in the pleadings, if carefully attended to will be found to come within some of the rules & distinctions before made— But it is said by ingenious gentleman that all omissions in declarations are cured which by any possibility might have been stated and in short to have a declaration bad after verdict there must be enough stated not only to show that the Plf had no right in that action but also to show

that he never could have in any other
This appears to be not only carrying the the matter
further than the reason of the rule will warrant
but directly opposed to authorities For in the action
for keeping the malicious Bull Science might have
been stated - so might a consideration in the Assump.
& certainly notice might in the implied Assumpsit
Besides whenever a declaration is drawn & the
general issue pleaded the Jury are bound by their
oaths to find for the Plff if he prove the facts
which are alledged in his declaration - And this
being the case how can we presume they have
found any fact more than what is alledged?
~~in his declaration? And this being the~~ I conceive
we never can unless the fact omitted is circum-
stanced as before mentioned - But it is said
that the Jury are supposed to find every fact
which in point of law is sufficient to support
their verdict & that in the case of Assumpsit
where notice being necessary is omitted the jury
in finding the Assumpsit must have found
the notice - If this be the case then every de-
claration is aided, for there is none so bad
but what in finding a fact or facts the jury
may make it good - for inst. Andrews B. for
charging him with lying & the general issue

pleaded & the Jury find guilty, now why not say that as the Jury have found guilt and in the eye of law there is no guilt in the charge of ~~charging a man with~~ lying, therefore it must be the jury have found actionable words, viz. a charge of theft— And yet nobody will pretend that this is the case— In short the jury have nothing to do with any inference of law— Their business is to find the facts to be true or false which the Plf has stated— and whether he has stated enough or not must be determined by the Court whose business it is to decide all questions of law— Finis

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A postea is nothing more than the history of the proceedings after issue is joined & the case is sent out to trial before the Justices of Assize & nisi prius, till it is brought back to the Court from whence it was sent. These proceedings are entered on record which is called the postea

New trials are granted only for matters dehors the record— But arrests arise from intrinsick causes appearing on the record—

N.B. When an Exon is issued by a Justice for a sum less than his cognizance the officer would be liable as well as the Justice & Plf. If the Exon was under £20 the officer would not be liable Coste if it does not appear in the face of the Exon that it is beyond the justices jurisdiction for it might have been for an acknowledged debt, in which case it was within his cognizance— but if over £20 then

Of the Jurisdiction & Proceedings of the Several Courts in Connecticut

By T. Reeve

In Connecticut there are several Courts for trying causes at Law and punishing Offenders, with very different Jurisdictions. A Justice of the Peace has jurisdiction to try all civil demands which come before him as a Court of Law when the matter in demand does not exceed £4, except where the title of Land is concerned to which his jurisdiction does not extend — Securities for money & Bills of credit vouched with two witnesses are cognizable by him where the Sum in demand does not exceed £10 Whenever an Officer receives a Writ upon mesne process or a Writ of Execution returnable to a Justice and shall not execute the same or make a false or undue return — for every such neglect or misfeasance the Officer is liable before the Justice to whom such writ was returnable altho the damages demanded exceed £4 — Justices are empowered to take confessions of debtors to the amount of £20 & this is not be understood with costs inclusive — The Judgmt of a Justice is final in a suit brot on a Security for money or Bills of credit with 2 witnesses & in which the demand does not exceed £10 — likewise in debt on judgmt of a Justice if it does not exceed £10 — & on an Officers receipt for an execution pursuing the stat. mode of suit, except where the

Judgment on which the exec.n issued was by confession of the debtor for more than £20

In all other cases within the Jurisdiction of a Justice where the Sum demanded exceeds 40/ there lies an appeal to the next County Court which appeal may be taken from a Judgmt. on a plea of abatem.t or demurrer as well as the merits of the case

If the Deft pleads Title in an action of trespass before a Justice he cannot try it, but must bind the Dft in a Bond not exceeding £20 to prosecute his Plea & bring forward a Suit for the trial of his title at the next County Ct.

Justices have no cognizance in matters of Equity, neither can they grant a new trial — All actions before a Justice must be brot in town where one of the Parties lives — When a Justice renders a judgmt. for more than £4 including cost, yet a fieri facias may be brot against the Bail to recover the amount of the Judgmt. before the same Justice —

In all matters cognizable by a Justice he has exclusive Jurisdiction except where an Officer is sued for not executing or making a false return of a writ returnable before a Justice demanding more than £4 damages in which he County Court have a concurrent Jurisdiction with the Justice before whom it was returnable — As there is no provision made by Law, or Justices to appoint auditors, it may be a ques-

tion whether they have any Jurisdiction in matters of account, and also whether they have a power to try a Scire facias against a Garnishee. But general practice is in favor of their Jurisdiction in both cases. Neither is there any Provision made for giving Bonds upon an appeal from the Judgment of a Justice, but it is the universal practice to take bonds. A Justices Jurisdiction to try civil causes does not extend beyond the limits of his own town where there is authority in the town where the cause is to be tried proper to try the same.

Of the Court of Common Pleas

The Court of Common Pleas have cognizance of actions except those mentioned & a few others of a particular complexion in which the Superior Ct. have exclusive Jurisdiction — All actions wherein the matter in demand does not exceed £20 where the title of land is not concerned, and all actions on Bonds or notes for the paymt. of money only & Bills of credit vouched by two witnesses, unless where a Justice has exclusive Jurisdiction are heard and determined by the Ct. of Common Pleas — Wherever an officer is sued in account for an Execution the Judgmt. of the Court of Common Pleas is final and in all actions of account where auditors have been appointed who have set & made their report, the judgmt

of this Court is final. The same rule obtains in Book debts after the return of Auditors—
Likewise when a matter in controversy has been submitted to arbitrators by rule of Court the judgmt of the Court on their return is final.
This Court has an exclusive jurisdiction of all matters in Equity from the smallest matter to £100 In all their cases cognizable by this Court there lies an appeal to the next Sup.r Ct. and the judg.t of the Sup.r Ct. is final in all matters which come before them by appeal. Whenever an action is brot against an Officer in the Superior Ct. for not executing a writ returnable there, or for making a false or undue return their Jurisdiction is original & judgmt final. (This last belongs to the head of the Superior Court)
This Court has also, originally final Jurisdiction where a scire facias is issued upon a judgmt rendered by them. This Court hears & determines all Writs of Error from the Judgmt of Justices & the Ct. of Common Pleas— They have power to grant Bills of divorce in certain cases— They have the exclusive cognizance of cases in chancery from the sum of £100 to £1600— Writs of Error may be brot upon proceedings in equity as well as Law. It is the peculiar province of this Court to issue Writs of Mandamus, Prohibition & Habeas Corpus.

Jury

All issues joined on a matter of fact in the Court of Common Pleas or the Superior Court shall be tried by the Jury except by agreemt of the

parties put themselves on the Court for trial

Default

Upon a default the Clerk of the Court makes up the damages (as it is termed "to be heard in damages) Likewise on a demurrer judgmt is in chief, yet if it be requested the Court will hear the parties in damages— (Penalties set in equity are not chancerable—

Upon the forfeiture of a Bond the Court will chancer down the penalty to the principal, interest & costs So upon a Bond with a condition that may be broken at several different times & a writ is brot for the first breach the Court will render judgmt for what is then in equity due & lodge the bond with the Clerk of the Court & upon a subsequent breach the obligee may have a scire facias to cite in the obligor to shew reason why judgmt should not be rendered for a future breach—

In trials in Chancery the Court may enquire into the facts themselves by a Committee

Supreme Court of Errors

This Court has no original jurisdiction but is constituted solely for the purpose of trying suits in Error from the Supr Ct

Of Courts of Probate

This State is divided in districts in each of which there is a Court of Probate consisting of a single judge who has cognizance of the Probate of wills, of granting administration, of appointing guardians and acting in all testamentary matters— From this Court there is an appeal to the ~~next~~ Superior Court

General Assembly

The General Assembly of this State is a Ct. for the purpose of trying all suits brot against the State by an individual — It is also a Ct. of Chancery for determing all cases in Equity which exceed £1600.

In all these Cts they appoint their own Clerks except Justices who have none —
The General Assembly also grant divorces where the Sup.r Ct. cannot —

Process

The ordinary process in civil actions is by Summons or Attachment. These if returnable before a Justice may be signed by a Justice unless the debtor be sued to answer out of the County in which he resides. In such case it must be signed by an Assist.t or Judge of the County a Superior Court, or by the Governor or Deputy Governor of the State — Unless it be a Scire facias which may be signed by a Justice of the Peace —
Writs returnable before the County Court may be signed by the Justice or Clerk of the Court unless the deft belong out of the County when they must be signed by an Assist.t * as in case of a Summons, unless it be a Scire facias which must be signed by the Clerk, or an Audita querela which must be signed by the Chief Justice of the County Court — The Judges of the County Ct can only sign writs returnable before themselves or Justices of the Peace —

* By a late Stat. judges of the Ct. that may sign writs returnable before them tho' the debtor live in what County he may —

Writs returnable before the Supr Ct may be signed by a Justice unless the Deft be Summond to answer out of the County in which he resides in which case it must be signed by an Assistant &c — Also in case of a Scire facias which must be signed by the Clerk of Ct to which it is made returnable in all cases yet if it be a writ of Error it must be signed by one of the Judges of the Supr Ct — If an Elita Querela by the Chief Judge Writs returnable before the Supreme Ct of Errors must be signed by one of the Judges of that Ct

Of Service

When one is sued by Summons the writ must be served by reading it in the hearing of the Deft or by leaving a true & attested Copy at the Defts last usual place of abode But if sued by attachmt it must be served on the Chattels of the Deft and for want there of on his lands or body & by reading it in his hearing or leaving a Copy — When served on the person the body is held in custody to respond judgmt & when the body is attached & final judgmt rendered Exn must issue else levied on the body within 5 days after the rising of the Court when personal property is attached it is holden 4 months — If the estate is attached the Officer must leave a true Copy of the attachmt with the Deft or where he has last dwelt with his return thereon describing the estate If it be real estate he must also leave a Copy with the Register of the Town where the land

lies with a description thereof within seven days after the attachment & before the expiration of the time limited by law for the service of writs—

Factors, Agents or Attornies

When a person is sued who is not an inhabitant of this State it is good service to leave a Copy with his attorney. In case estate is attached & the Dft has no attorney in this State any reasonable notice to him of the suit is sufficient. When the suit is against one not an inhabt of this State a Copy of the Writ being left with any person having in his hands the debtors property or of him who owes the debtor as attorney or Trustee shall be good service & not only so but shall be a good lien on the estate of the debtor in such persons possession or on debts due to the debtor— And after the judgmt against the debtor is had and non est as to the estate is returned on the Exn a fcire facias will issue against such attorney and a recovery be had against him de bonis propriis to the amount of the debt if the attorney has so much in his hands and in that case the trustee or attorney is called upon as a witness to answer upon oath what effects of the debtor he has in his hands

Of Service on a Community

It is a sufficient service to leave a Copy of the writ with the Clerk of the community or a Committee or if it be a township a selectman

Of Joint Debtors

Whenever there are joint debtors & any one of

them does not reside in this State. The service of the writ on him or them who are in the State shall be sufficient & in case the absent defdt shall suppose himself injured by the Judgt rendered after such service he may obtain relief by Audita Querela

Of Limitation of Notice

When a writ is returnable before a Justice service must be made six days before trial, the day of trial inclusive — When returnable before any other Court service must be made 12 days before trial (including the day of trial. When service is made on an attorney there must be 14 days notice whether the writ is returnable before a Justice or other Court. The same rule obtains where an Officer is sued for not executing or making a false return

Bonds for Prosecution

When a Summons is issued if the Plf. live out of the State he must procure a bondsman for prosecution and whenever it shall appear to the signing authority that the Plf altho he is an inhabitant of this State has not sufficient estate to respond the Bill of cost which may be recovered against him he ought to require the Plf to procure a Bondsman to prosecute. And in any other stage of the proceedings the Ct may order

the Plff to find pledges for prosecution - Whenever an attachment issues a bond to prosecute must be given

Of Entering Bail

Whenever the body of the Deft is attached the Officer shall take Bail for his appearance at the Ct if suffict Bail be offered - If no bail be offered & procured the Officer must keep his body in custody & have him in Ct. Whenever he enters Special Bail (or as the Eng. Law terms it "Bail to the action") he is again at liberty. If no Special Bail be entered he is to be committed to gaol & if he pleads he must plead in custody.

When a Judgmt is rendered by a Justice or the County Court and an appeal is moved for, bonds to prosecute the appeal are required Where personal property is taken a replevin may be issued to restore the property to the deft upon his procuring suffict bonds to answer all damages which the Plff may recover against the Deft When & after a writ is ~~returned~~ issued it must be returned to the Ct to which it is made re turnable — When an appeal is made it must be entered in the Docket of the Clk of the Ct before the 2nd opening of the Ct.

Of Pleas & Pleadings & 1st Of Abatement

When a suit is brot to the Ct & the proceedings are commenced, if the Ct has not cognizance of the case, a plea to the Jurisdiction of the Court

is the proper plea — This is what is called improperly a plea of abatement We are term it such & plead it as such — when it is found that the Ct. has cognizance of the case the next plea in order is a plea of Abatement This is assigning reasons by the Dft why he should not answer to the Plffs writ — It may be for some defect in the Writ, or irregularity or it may be for some requisite to obtain a Writ (as not paying the duty by law required) or for an alteration in the Plffs circumstances since the date of the writ (as when a feme sole sues & marries) This is This is a dilatory plea & if the Plff succeeds the judgmt is a Respondeas ouster — If the judgmt be that the writ abate the Plff may commence a new suit But when the Dft pleads a fact on which issue is taken & the jury try it, the judgm is in chief — It is a rule in abatement that when they are plead they must be so pleaded as to enable the Plff to bring a true Writ A Writ & declaration in this State both go out together to be served on the Dft — We consound the terms Writing them synonomous — But they do not mean the same — The writ is the mandatory part addressed to the Officer & continues until the action is named Then begins the declaration — The date is applied to both the signing & duty of the Writ — For any fault in the declaration a plea of abatement is not proper but a demurrer either general or special as the case may be — Yet it is very common to plead by way of abatement for a demurrable fault — so that if the plea proves insufficient there may be a respondeas ouster instead of a Judgmt in chief — a custom which encourages dilatory pleas & cannot be justified upon legal principles —

There lies an Appeal from the Judgmt of a Justice or the County Ct upon a plea of abatemt if the case be appealable & it be a question of law to be tried & Error lies — When the Dft pleads a batemt & appeals & again in the upper Ct pleads in abatement also (for he may upon such removal change his plea) and judgmt of respondeat ouster is again given against him, execution shall issue for that case altho he recover on the merits — It is usual in Petitions in Chancery & for new trials to plead by way of abatemt matters which go not only to the form but to the substance of the petition — That which could be a genrial demurrer to a declaration is an abatemt to a petition —

When a plea of Abatemt is found against the Dft shall have liberty to amend if the defect be in its own nature amendable — As in case of a misnomer in respect to the place of residence — Amendmts may not be made when the amendments to be amended are contrary to truth — As if the service of the writ appears by the Officers endorsemt to be on Friday the day after the time of service is expired yet in fact if it was the day precedent it shall is amendable — but if it was served after the time there can be no amendmt — Amendmts are never allowed without paying costs —

Demurrer

When we find that the action is brot before the proper forum & there is no cause of abatemt we then attend to the declar & if we find defect in point of form only we take advantage of it by special demurrer which is parte —

cularly assigning why it is deficient
a demurrer admits the facts as laid in the
declar^n to be true but denies their action ability.
that there is no ground for a recovery even sup-
posing them true — In many cases the demurrer
goes only to the decl^n which shews that there ought
to be no recovery where something is omitted which
if stated & true would be a suffict ground — As
where an action is brot in which the law requires
that notice should have been given of a service
performed or a debt due before an action could
be maintained — Here the omission of Notice would
be a ground of demurrer — for tho indeed notice
may have been given & there is a ground of
action yet both these ought to appear to the Ct —
Upon such decla^n being defeated a new action
may be brot & the ~~def~~ deficiency amended —
At other times the demurrer goes to the action
Viz. when the pretended cause of action is
such an one as is not recognized by law as a cause
of action — In this case no decla^n can be drawn
consistently with the truth of facts which can
be possibly supported — And a demurrer is not
only a bar to that particular action but a Judgm^t
will be a bar to any subsequent action for the
same cause — as if an action be brot upon a
charge of lying — such a charge not being actiona-
ble no decla^n grounded on it can be supported
Where the demurrer should be special & where
general it is difficult to give a rule — Our
practice is so loose in this respect that no very

accurate
distinction can be made — I should suppose that a general demurrer ought to be confined to what I have called a demurrer to the action & that all demurrers merely to the declaⁿ should be special This I mention as what would be a good general rule but not in fact what takes place in the English or our Courts so that we may continue to draw the line that in all cases where the demurrer goes to the action it is general, but where there is a demurrer for a defect which is merely an informality it must be special — For other defects of a more considerable nature as not alledging a consideration in Assumpsit which if alledged would make a good declaⁿ the common practice is to demur generally The judgmt on demurrer is in chief — A demurrer may be taken in any stage of the proceedings as well as to the declaⁿ (Dft to a plea it admits the truth of the facts but denies them to be a good defence So to replications, rejoinders &c —

Pleas to the Action

When the action is brot before the proper tribunal & can neither be abated nor defeated by demurrer the Dft may plead a plea in bar, or the general issue as the case may demand — The general issue may be said to be a total denial of the facts alledged as not guilty in Trespass &c, & nil debt in debt &c &c — Under the general issue we are permitted by Statute to give almost every thing in evidence as justification in Slander &c — Indeed there

is nothing required to be pleaded specially by our Stat. except where the Dft is saved by the act of the Plf. as by a Release &c And in some cases where we may give the Special matter in evidence it is common to plead specially and in some cases the practice of pleading specially has been so uniform that I doubt whether the Court would permit the special matter to be given in evidence tho seemingly warranted by Stat. as Usury, duress &c

Plea in Barr

A Plea in bar is an answer to the Plfs charge in the decla^n which admits as in case of a demurrer the truth of the facts but assigns some reason new matter not appearing upon the decla^n as a reason why the Plf should not recover. As in debt or bond the Deft admits he gave the Bond but that he has already made full payment of it which is pleading in bar — When this reason is assigned the Plf must answer it which is called a replication This may be either by demurrer which admits the truth of the plea but denies its sufficiency in law to over throw the Plfs claim — As if a deft in a suit on a Note should plead that it was usurious & neglects to alledge it to be a corrupt agreem^t the Plf can demur for want of this allegation — which would bring the question before the Ct whether such allegation is material or not, or it may be by traverse of the

facts alledged in the plea which is a denial of the truth of facts & brings the question of the facts to the trial of the Jury - as when the Dfts plea is infancy - this is traversed - Infancy or not is the question. - Or the Plfs answer may be an admission of the facts stated in the plea at the same time assigning some reason not inconsistent with the decln and which does not appear on the Declan or Plea why the Dft ought not to avail himself of the matter alledged in the plea - as where the Dft pleads in bar his infancy, the Plf admits the fact but says that it is an insufficient bar to the action because the debt alledged in his declan was for necessaries - To this replication the Dft must answer by demurrer or traverse, or rejoining some new matter which has not appeared before in the course of the pleadings and so on till some issue in fact or law is joined between the parties. Whenever the issue is joined on a demurrer, the demurrer pervades the whole pleadings & goes back to the first defect - As in an action of Assumpsit, the declan states no consideration & the Dft pleads such a plea as the Plf thinks is insufficient defence, he therefore demurs to it & if it is found an ill plea - yet it is good enough for the Plfs declan which the demurrer reaches. Whenever the declan counts upon some writing and does not recite the writing but counts upon it as the Plf considers to be the operation of law and the Dft conceives it to be directly contrary

and wishes to bring the question of law properly before the Ct. he will pray oyer of the writing & recite it verbatim & having then made it parcel of the record will demur for it now becomes the same as if the Plf had recited it at large which if he had done the Deft would have demurred to in the first instance — Whenever an issue of fact is joined to the country if the evidence admitted to support the fact be such as in the opinion of the opposite party is insufficient in law he may demur to the evidence — This is done by stating exactly all that was testified at the trial in writing & if true the opposite party must join — The question is then before the Ct whether the evidence is sufficient or not — There is no contention what the evidence is. This is all settled by the demurrer except the operation of it. It is frequently litigated in the course of trials whether the witnesses addduced be legal and whether the matter offered be pertinent to the issue — The first may happen when contended that the witness is interested. The last may be exemplified in this manner — where Usury is pleaded & the Deft knows that it cannot be proved & offers evidence of another kind. If then therefor you suppose the Court admits an improper witness or suffers improper matter to be given in evidence you may file a Bill of exceptions stating the whole matte

as it appears before the Ct. which the Judge must certify to be true — This lays a foundation for a writ of error, in which writ the same question if they reverse it is tried in the Upper Ct. as in the lower Ct. If the Upper Ct. affirms the Judgmt. of the lower Ct. then is an end of the matter —

Of Motions in Arrest

A motion in arrest may be made after Verdict for the insufficiency of the Declaⁿ Plea Replicaⁿ &c — as in Slander the charge is for calling the Plf a liar — the Dft pleads not guilty — Verdict Guilty — The Dft may arrest the Judgmt as no suit is maintainable for such charge — So also in Usury if the Jury omits to insert a corrupt agreemt & tho the Jury find it to be usurious & judgmt is the Plf's favor it may be arrested — and in this case a repleader is ordered —

But where is such deficiency & no good ground for a suit no repleader is ordered for this puts an end to the business — Many defects which would have been fatal in Demurrer are aided by Verdict & cannot be taken advantage of in arrest of Judgmt — If upon reviewing the declaration something is omitted which if it had been alledged would have rendered it suffict it shall be presumed that it was proved to the Jury otherwise they could not have given a Verdict for the Plf since it was necessary to be proved in order to entitle him to a recovery such omission is aided — As suppose a decla-

ration in Assumpsit where the law requires notice to be given and notice is omitted there is good cause of demurrer, but on motion in arrest it shall be presumed that notice was proved to the Jury or there would not have been a verdict for the Plff — see Essay 507 where this doctrine is denied — But if it appears from the declaration that there could not be a ground for a recovery that no supportable allegation could have been insisted which would have rendered it a good one the verdict does not aid such defect — As where one is sued for calling another a Liar.

When there is motion in arrest for variation is laid for error — It would seem that the rule did not obtain respecting a verdict as aiding a plea in bar, or other subsequent proceedings as in case of a declaration on contract — If a plea of Usury is put in & no corrupt agreement alleged altho the Jury find in the words of the plea that the contract was usurious, yet the want of the term "corrupt agreement" is not aided by the verdict — It would seem that by finding Usury they had found the corruption as case of "notice" before put, but in that case as notice is necessary to constitute the Assumpsit, it is fair to conclude that when they had found the Assumpsit that they also found the notice — see the Essay page 506-7 &c — But when there is a verdict on a special plea they do not find generally but undertake to find specially the whole matter — therefore when they find that as being the whole matter & all the

particulars which they can find do not mention a corrupt agreement it is not fair to presume that they have found any corruption — But had the Jury inserted in their verdict "corrupt agreement as they might have done the plea would have been avoided.

By our Practice there may be many things dehors the record which are reasons for arresting the verdict — as misbehavior in the Jury, apparent mistake in casting a footing an account, improper writings being delivered to them in Ct &c &c

New Trials

After an final trial before the County or Sup.r Cts petitions for new trials are very common. The reasons for granting new trials are 1st mispleading: as where one has demurred where he ought to have plead the General issue 2d. The discovery of new Testimony which is material in the case — In this case the names of the witnesses must be inserted in the petition and the substance of what they will testify, or the petition must abate — If these be inserted the Ct will hear the witnesses & if reasonable will grant a new trial & whenever the petition is granted the first judgment is vacated A petition for a new trial before granted is no supersedeas to an execn on the first trial altho the evidence be new & if the petitioner knew of such testimony at the former trial & might have introduced it, it is no reason for granting a new trial And if a witness at a former trial, now undertakes to remember more than he testified then, no new trial will be granted for this reason — 3d Another ground for granting such Petition is — Exception

damages— This rarely ever prevails, it being a rule with the Ct that they will never grant a new trial for excessive damages unless they are enormous & flagrantly excessive, such as raise a strong presumption of partiality in the jury— When the damages arise from contract there is no necessity for this presumption but it discretionary with the Ct in any excess of damages. 4th ground is the smallness of damages. This like the last scarcely ever prevails. Courts have in some instances granted new trials because the verdict was against Law but it is apprehended they do not view it as a ground for a new trial

5th That the verdict is against evidence But this is not to be understood when it is the opinion of the Ct against the weight of evidence, but when there was no evidence adduced on the successful side. When the Jury misbehave, when one of them is corrupted when the witnesses are tampered with, new trials are granted

Special Verdict

When a case is committed to the jury they may if they please find the facts as proved, by a Special Verdict and leave the question of law to be tried by the Ct — This answers the same purpose as a demurrer to evidence or filing a Bill of exceptions after the Verdict & lays a foundation for a writ of error—

Of Writs of Error

A writ of error lies both for error in fact & error in Law - but it is not to be understood that it lies for any error respecting facts enquired into at the trial - for it is a settled rule that no such errors are to be alledged in the Writ - What is meant by an error in fact may be thus explained - An infant is sued without mentioning any guardian & the Ct will not appoint one - Judgmt is rendered agt the infr. This altho it does not appear on the record whether they appointed one or not is an error in fact & a ground for a writ of error. Also having been served & judgmt rendered by default it is an error in fact. Instances of these writs are rare - But writs of Error in Law are very frequent - & may be had in all cases where a question of Law without mixture of fact has been decided by the Ct provided the question made & decided appears on the record - Hence it is that Error lies upon a Judgmt in abatement where the matter in abatemt was a question in Law; - upon a demurrer to evidence, or a special verdict, a bill of exceptions & a motion in arrest provided the motion be for some cause that appears on the face of the proceedings -

No error lies on an interlocutory Judgmt till the final Judgmt nor can an error in Law & an error in fact be joined on the same writ.

The general issue is in nullo est erratum.

Upon a recital of a Judgmt of a Court of the Ct in error receives all that he has been

damnified but recovers no cost in the Sup. Ct. in Error yet we find in our Stat. that where there is an erroneous Judgmt by a Justices or Court by Ct. the Plff may enter his action in the Sup. Ct. as if it came there by appeal — This in practice would be abused in many cases but in general it is as well as where a Bill of exceptions has been filed for the admission of a witness & in pleas of abatement where the merits have not been tried it may be proper for the Plff to enter for instance A. sues B. & offers C for a witness — he is objected to by B. but is admitted — B. is cast in the suit, files his bill of exceptions & brings error. The witness is adjudged inadmissible — now it would be unreasonable if A. might not enter & have his action tried on the merits — Judgmt in abatement is reversed in favor of the original Plff he must enter if he would have his cause tried —

Upon Writs of Error for any such matter as the last mentioned there can be no trial of facts because there is no jury —

Writs of error may be had in proceedings in Equity as well as law. A Writ of Error is a supersedeas to an execn — Writs of error without a Bond altho sufficient to try the question of law and on which there may be a reversal or affirmance yet it is no supersedeas for it would not be reasonable to stop an Execution unless security was given to respond the damages which such delay might occasion. And when a Reversal is obtained in the Ct of Errors upon a

point collateral to the merits as upon pleas of abatement where the Ct had ~~had~~ rendered judgmt that it should abate — or for the admission of Testimony the cause must be sent back to be tried upon its merits for the Cts of Errors have no jurisdiction over them — When the error is in fact it is to be ~~carried~~ before the same Ct if that Ct be a Ct of Error —

Audita Querela

When the Dft is unsuccessful in his defence Exn will issue upon the Judgmt agt him unless some matter has arisen since the judgmt which if it would be taken notice of ought to operate in his favor in such case if he has had no day in Ct to shew this new matter in his behalf he shall be entitled not pro Specialé but in debito to a writ of audita querela — In this writ are stated the reasons why Exn should not be enforced — such as paymt since judgmt which by negligence fraud or accident is not endorsed on the Exn — The Writ is directed to the officer who has the Exn to stay all proceedings on the same until the complaint be heard — It is signed by the Chief Judge of the Ct after having examined & found probable cause for the complaint — Upon this Writ bonds are entered to make good all damages that may be sustained if the complaint be not supported — The object of the Writ is not only to set aside the Exn but also to recover the damages which have been sustained — As if after paymt of the money it had been again collected upon the Exn it would be to recover it back. It is

in this case a concurrent remedy with an act^n of Indeb: Assumps: It lies in all cases where a man has by fraud been prevented from having a day in Ct. As where A. sues B. & after service they came together & entered into an agreem^t to stop proceedings or that the suit shall stop & be withdrawn & B gives himself no farther trouble about it: but A fraudulently proceeds & obtains Judgm^t by default. In this case B shall be relieved by audita querela

Of the Levy of Execution

Executions are levied upon the estate or body of the debtor If personal estate be turned out by the debtor the officer cannot levy on the body — before levy demand must be made of the debtor (if he can be found) of the mony due — If personal estate is not turned out the Creditor has his election to take the body or real estate of the debtor — When personal estate is taken it must be advertised 20 days on the public Sign Post & then sold at Vendue & the creditors paid. If levied on the body he is to be committed to Jail & there remain till released by the payment of the mony or taking the poor-man's oath or by death — In these two last cases the debt is not extinguished while the body was taken — it was a temporary satisfaction but as soon as released by the payment of the mony taking the oath or by death the debt is revived But the debtor's body cannot again be taken but his estate may which could not be the case while the body was taken.

It will also survive agt the Exr If Real estate be taken it must be appriz'd by 3 freeholders of the town where the land lies and be returned to the office of the Clk of the Ct where the execn issued — which shall be suffict evidence of a title in the Creditor. If Chattels real or life estates are taken they are holden till the profits settle by the apprizers shall pay the debt They then revert to the former owner

It is a doctrine of the Books when an Exn has been satisfied by taking lands & the land did not belong to the debtor but was taken by mistake the debt is extinguished — This appears ridiculously unreasonable, altho it might not be in the power of the creditor to levy another exn, yet I see no reason why he might not have an actn of debt on judgt on which an exn or scire facias might issue — So if an Exn was levied on dower estate & the same was apprized at £10 pr an: & extended for 10 years & the widow at the end of 5 years should die, £50 of the debt is paid & if she left estate I should suppose a scire facias agt her Exrs would recover the other £50

Notes on the above Essay

13. New trials are not commonly granted to the Pff where the action is founded in malfeasance — but they are granted in favor of the publick quere. Can they be in favor of individuals? —

Bail

Bail upon writ of Error & audita querela should be suffict to answer all damages as well as costs — otherwise the Dft in error being delayed until the property attached be alienated by the intervention of 60 days after the judgt on the Statute of limitations the Bail might lose his

security all the judgmt should be affirmed
Bdtil on an appeal on judgmt of a Justice of the peace in criminal matters is conditioned to appear & abide judgmt I am of opinion that all bonds of appeal ought to be large enough to cover all damages that might ensue from the appeal just as Bar kruptcy absconding &c &c

Dower of Personal estate

Our Stat. gives 1/3 of personal estate to the wife on the husbds death yet she may not hold it as she may 1/3 of the real against creditors except such necessary household furniture as is by law exempted from exn and the Paraphernalia

Of a Scire facias agt Attorney &c

When exn issues agt an absconding debtor upon judgmt the Officer must repair to the last residence of the debtor & make demand & also make demand of the attorney by & if nothing is shown him & he can find nothing whereon to levy he returns what he has done & I think sometimes non est inventus

The Scire facias goes out agt the attorney It is in the nature of a petition to the Ct wherein the judgmt on which it was recovered is stated to the Ct the fact, judgmt exn & return &c praying a remedy in the premises — thon proceeds the precept to the Sheriff &c to cause the Dft to appear & shew reasons if any why judgmt should not be affirmed exn vs him — signed by the Clk of the ~~County~~ Ct where it is returnable — But the attorney may have out the estate & satisfy the exn if he plead

and the principal shall account with him for such amt.

Process

Under the head of process it ought to have been observed that where there is a default to be heard in damages the Ct without the intervention of a jury assess the damages & from this judgmt there lies an Appeal as in other cases and when such a judgmt is rendered upon some event in writing for damages that have arisen, and yet there may be further damages by reason of some future breach of the covent that when that event takes place a scire facias issues and so on tolies quoties —

Finis

A suit is brot agt Husb & Wife for a debt of the wife contracted whilst she was sole & pending the suit, before judgmt the wife dies a great & unsettled question arises "Can Judgmont in such case be rendered agt the Husb?" On the one side it is argued "that the "reason why the Husb is joined with the wife in "such case is not because he has got her prop[y] "for if it was so he would be liable if she died "before the suit commenced which clearly is not the "case, but the true reason is that the wife, whose "property is taken away by the operation of law & who is thus rendered incapable of discharging her debts, "should not be taken in execution & unreasonably con- "fined in Jail — On her death therefore this reason "which is the only one why he should be joined, "ceasing, he ought not to be made liable"

On the other hand it might be said "That the suit being commenced during coverture the right of

"the creditor attached itself to the trust property
"& cannot be destroyed by the contingency of her
"dying before judgm^t" And this on the general
principle which pervades all cases "that where
one's right is attached to another's property by
the commencement of a suit, such right shall
not be defeated by any contingency which may
happen before judgment".

Why may not a Fame court convey her
real estate subject the husb^d's encumbrance?
What is the reason in Eng.? The only reason
given there is that it cannot commence in
future; the estate would be suspended!!!!&
it appears is the English writers to imagine such
a case — But our Ct^s have had sense enough
to abolish that maxim — What then can be
the policy of placing in cases the only reasons
on which they were founded failing?

When an act^n is brot on stat. for a penalty
as in case of trespass for cutting trees &c the
damages must be estimated & appear on
the face of the declar^n.

A few scattering ideas which escaped me in the first course of Mr Rowe's Lectures—

Jan: 25–95

The Wife's liability for her contracts when under articles of separation—

See 1 Durn & E 5 In this case it is apprehended that the Reporters have not done the Judge justice in relating their opinions— The case was undoubtedly decided right but the ground upon which it was decided does not appear given us by the Reporters To arrive at the true reason why a woman thus separated from her husband ought to bind herself by her contracts to the extent of such contracts, we ~~must accurately~~ ought to consider the reasons why she may not bind herself in the same manner whilst they live together— These are first, because the law has thrown all her property into her husband's hands; & still farther, it has given him the exclusive right to her services & thus put it utterly out of her power to fulfil her contracts. All must agree that these are the only reasons why a woman under Coverture may not bind herself by her bargains— If so it follows as clear as daylight, that when these reasons totally cease; as when the husband has renounced (as he does by articles of separation) all his right to the property & services of his wife, the law founded on these reasons must

of course cease if the wife bind herself as well as tho she had never married —
For the authorities &c on this subject see the 1st vol. of these Lectures —

Powell in his Essay on Contracts speaks largely against the above doctrine — He seems to suppose that it is inconsistent with the state of marriage (which is not legally dissolved by the articles of sep.) that the wife should bind herself by her own contracts — But this certainly can be no reason when it is considered that it has long been settled law that she may, when living with the husb. bind herself by her bargains to the extent of her separate property — This is enough to shew that there is no magic in coverture itself which disables the wife from rendering herself liable to discharge her debts —

The Husb. liability for his Wifes contracts

Where she goes from the Husb. contrary for necessaries according to her rank, this distinction is to be observed as to when the husb. is or is not liable — Where he was the criminal cause of her departure as for instance if he drives her out of doors, or if he so abuse her that she is obliged to depart for safety &c he is in all such cases liable for contracts for necessaries — But on the other hand if she elope without any sufficient cause, as where she —

leaves him merely because she fancies he is not the most agreeable partner, or where she ~~where~~ runs away with an adulterer. Indeed it is apprehended ought to be placed on the same footing in such cases she cannot charge him for by her contracts — unless indeed she contracts where he has usually allowed her & at the time the person who trusted her did not know of her elopement. A case however was decided in Eng. against this last doctrine. The wife eloped with an adulterer & took goods of a Merchant who knew not of her elopement. If had been allowed her by her husband to contract. The Merchant sued the husband & failed to recover. But it is apprehended that this case was decided on mistaken principles. The Judges (as the practise is among the English Lawyers) looked to the rule of assent. Tho they frequently find his assent where there is an express dissent on his part, yet in this instance the Judges said that no man could assent to the contracts of a wife who run off with an adulterer. They therefore refused to make him liable. But to consider this on principle recourse must be had to other analagous cases. A Merchant for example allows his Clerk generally to contract for him & his Clerk runs away & takes up articles on his master's credit of a person who knows

not of his having run off — or again a man in any business employs an agent or as the law expresses it a servant to contract for him & the agent obtains property out of another's hands on his master's credit & takes this opportunity of running away with such property. In both these instances the master would undoubtedly be held liable, ~~such as the Clerk's &c &c for his agents deceit~~ — why then in the name of common sense shall not the husb^d be liable for his wife's contracts which she makes with one not knowing her elopem^t on the ground of her being the serv^t or agent of her husb^d. Is it more reasonable that an innocent man who has been allowed to trust another's wife by the husb^d consent, loose his mony, or the husb^d who has put confidence in his wife and suffered her to contract for him — If the Court in this case had resorted to the true distinction that she left the husb^d without cause instead of having an husband different) there would probably have been no trouble with the Clerk Agent &c & had notice of the elopem^t the husb^d would be charged with the contracts as the master would be in the other cases & in the same principle — A case in Str. 875 where the servt ran away but not with any debt or & he not liable —

Sept^r 9- Nov: 26^th

What agreements between Husband & Wife are valid ——

There is a circuitous method of conveying his real estate to her. This is done by his conveying it to one, who is to convey it to her. It is thus continued because of the amity which is said to subsist between them & which would according to that idea prevent a direct conveyance from him ——

The husb may convey an estate to her use, & an English Statute executing that use it amounts to a direct conveyance Co. Lit. 187- 112- 3 Atk 395 See also Wms & Powel

The wife may give her separate property to her husb ——

A man may devise real property to a feme covert with a power to convey it to whom she pleases - In such case she may execute that power in favor of her husb Co. Lit 112 — Where the husb was indebted to the wife before marriage by bond, there has been a difference in opinion whether or whether she might not sue him after his death such bond is discharged— The prevailing opinion is that it is not discharged— It is agreed by all so far as this that it cant be collected during coverture, nor after that it ended provided he lives 7 years from marriage. If however it is discharged by marriage which is the probable idea, clearly it cannot survive to her even if it was not born of

A contract entered into before marriage by the husb^d to the wife, to be performed after his death, is void in Equity — The intention of the parties ought to prevail notwithstanding the old maxim that "When a personal contract is once suspended it is annihilated" — See Hutton 17 Hob: 226 Cro. Jac. 571 Comyns Rep. 67 — 1 Salk 326 Carth: 312 The Chancellor will decree a spec: performance specifically in such case (See 2 Vern: 481 2 Vern: 343)

A conveyance is made to A.B. & C. & A.B. & C. are married — they take but half Co Lit. 187

Where the wife is under a separate maintenance & the husb^d is a Bankrupt, Chancery will decree her allowance in toto, notwithstanding the insolvency of husb^d & other Creditors have averaged — 3 Bro: Can: 614

The husb^d who lives separate by article, was about to compel his wife to dwell with him but Chancery stopped him — 1 Barrow 543 — 1 This proves he has no right to her services

It seems by an authority in Rep: 478 that the husb^d may restrain the wife's Liberty when she is wasting his property — Chancery will compel the Husband to give up a legacy bequeathed to his wife while under articles of separation.

Of Parent & Child —

On the Liability of the infant for his contracts

The reason why a minor cannot bind himself by a Bond is not as is said, because it is not for his benefit that he should subject himself to a penalty — for Courts of law will always change down the penalty of a bond, even when given by adults — but the true reason is that the consideration of a bond cannot be enquired into —

He is not liable upon his contract as such but on the ground that he has had an article necessary for him & ought therefore to pay a quantum valebat. To show that this distinction is just & reconcileable to the authorities we need only remember, that he is not liable for articles not necessary altho' he enter into even so firm a contract; & on the other hand if he enter into no contract he is liable for what is necessary — as if a Physician finds an infant in sickness & supplies him with medicine &c altho' the minor make no contract about it, he is liable —

It seems to be law that where a minor has entered into an intimate compromise he is not liable — But the items of an immm. comp. may be enquired into — why therefore should he not be liable? The way in which this absurdity has crept into the books it appears to be this formerly the items of such acct could not be enquired into & then because it was not proper that minors should be answerable, but afterwards when the law was altered and the items were allowed to be gone into it seems the Courts did not observe this but has they do

in many other cases) adhered to the consequence after the reason ceased—

When his contracts shall be consid^d void & when voidable only—

In Cro: Car: 502 It is laid down that where there is no semblance of advantage to the infᵗ it shall be absolutely void—but where there is a semblance of advantage voidable — he puts this case—as if an infᵗ give a lease without reserving rent, it is absolutely void, because on the face of the contract there is no semblance of benefit—But if rent had been reserved then not— This however L^d Mansfield treats as an unreasonable distinction for the minor might have taken the rent when he gave the lease & must it be void in such case? Yes if that authority is to govern. L^d Mansfield gives the true rule— He would treat the contract as void whenever it should be necessary to do this to shield the infant from injustice & oppression & in no other case— For authorities see 8. Burr: 1794—Str: 171—3 Mod: 248 L^d Ray^d 443—1 Vent: 51. 1 Sid.: 159 1 Lev: 169. 180—

His liability for his fraud

& minor is liable criminaliter for fraud, but from the Eng: authorities it would seem that he is not civiliter in a Ct of Law, but whether a Ct of law now considers him liable or not—it is certain a Court of equity will. See Vern: 132—2 Vern: 124 In all other cases they who are liable for fraud crim: are liable civiliter—& there is no reason why an infᵗ should not be— a hint in favor of making [illegible] See a case in 12 Vin: Abrid: 213

A reasonable settlement by a minor on his wife & children good in Chancery

Where in Engd an infr. could get a judgmt. vacated on Court would consider the whole transaction void, tho there is no practice with us of vacating the judgmt formally — Hard: 376 1 Atk. 489

The Manner of Punishing minors is different from that of punishing adult. — Co. Lit. 247

In capital crimes it is the same with them as others — But in moderate punishments as in trespasses &c where corporal punishments are created by Statute they are not inflicted upon minors unless particularly specified by the Statute In such they are to receive the Com. law punishmt only — Co. Lit. 357 1 Hawk. 147

For crimes of non-feasance an infr. is never to be punished — as if A, B, C, D were in company & A should kill B. — If C & D were adult they would be punished for not preventing A — but if minors not punishable —

A minor at 17 may execute a power over personal estate, for he is then of age to devise such property — But he cannot execute a power over real estate where he has any interest, till 21 — he may however where he is the mere instrumt or conduit pipe See Wesy 299 (a)

A child under 7 shall be considd incapable to take — devise &c See 2 Ld Raym. 710 Moore 177 637 Eliz. 123 1 Salk. 153 Tom. Rayd 163 Carth: 309

Minors are not liable for their conduct as attornies Bailiffs &c Carth. 172 Lach. 169 — Dalm. 528 Ld Raym. 40-9 respecting minors non liability for Bill of exchange &c Carth: 166 He cannot be a Surryman Hob. 325

When a man enters upon a minor's land & holds possession, he shall not be consid^d a wrong doer so as to drive the infant to an action before he can gain possession but such tresp^s after possession shall be consid^d the infant's possession 2 vern: 342-275 — Also after an ancestors decease the infant's entry shall not be taken away by the entry of another as it is in the case with adults

A minor is however liable for waste even if not done by himself — He is liable to no penalty in the like case

If there is a condition annexed to land which the minor holds that the owner shall of such land shall repair the bridge — he must repair it &c Or if the estate is held upon any other condition — as if an estate is to commence on the inf^t performing a certain act, or an estate is to be defeated on his doing a certain act in the former case if he does not comply with the condition the estate will never vest, & in the latter if he does not the act his estate shall be defeated — 1 Vent: 200 — 2 Rep. 44 — Prec: Can: 563 2 vern: 500 Co Litt. 246 — 2 Salk. 415 Hut. 92

When a minor fails in a suit by his guardian goes out ag^t him but the cost is finally recov^d out of the guardian a non est is to be returned as to the inf^t When a fieri facias on the judgm^t goes ag^t the guardian

A minor must always defend by guardian —

All judgm^t ag^t minors not sued by guardian are erroneous — but such being errors in fact are to be enquired into by the same court unlike errors in law —

Where several are joined & any of the rest of minors

& judgt is rendered agt all, an Ct will not aid the judgmt as to the minor & let it stand as to others. When several have been concerned in a trespass and one only sued & the whole is recovered of him if the cause of action founded in contract he can recover the several proportionable parts out of the rest, but if in tort it is otherwise —

Of Bastardy

Our County Ct has original jurisdiction in cases of bastardy — The proceeds are always criminal till judgmt & then it is civil. It is for maintenance only & not damages — The Ct compute the cost of bringg up the child for 4 years & calculate to make the father pay half that sum. & the exs are to issue quarterly — In the first is included expenses of lying in &c. He must find sureties by the judgmt for the payt of the $30 or whatever sum & if he obtain none he will be committed & if bond are given & exn issues agt him & he imprisond & swears out the landsmen are liable —

Can there be appeals in such case from the County Ct?

This depends upon the process being ~~either~~ criminal or civil — In criminal causes there is no appeal & to preserve a uniformity no appeal is allowed the process being criminal in dress, the civil in its effects

There have been contradictory decisions on this point but all the late cases are that there is no appeal —

They may be, and are usually tried by Juries & [illegible]

In criminal cases no depositions are admitted & indeed none in any cases are admitted at Com. Law this depends on Statute — these cases however being criminal in their progress no depositions are admissible —

It has been the practise for the Girl who prosecutes to give bonds to answer for cost but none are required the process being criminal and it being settled that no Bond are necessary in any criminal cause

(see a case in Kirby's Reports)

Of Common Recoveries & Fines

A common Recovery is a fictitious action
In this lands are recovered from the owner, which
recovery binds all persons & vests a fee simple absolute
in the recoveror.

The fiction is carried on this way. The man
who wishes to sell land. Suffers the Purcha-
-ser to bring an action for the lands he claimin
a better title than the tenᵗ in possession. The
tenant appears & vouches in a man of whom
he pretends to have had the lands to defend.
This vouchee appears & defends. Then the de-
mandant asks leave of the Ct to impark
or confer privately with the vouchee. This con-
-ference has the desired effect for the vouchee
appears no more, & the judgmᵗ consequently is
agᵗ him by default & the tenᵗ has judgmᵗ to
recover Land of equal value of the Dᵗ vouchee
who happening to be worth nothing all the Jointpoper
are annexed for the demandant has now
a fee simple estate. & so much for this
nonsense.

Of Fines & Common Recoveries

Fines are of great antiquity - There are instances of them before the Norman invasion. A fine is defined "The acknowledgment of a feoffment on record" & has all the force of a feoffment. It is indeed more sure for it is recorded in the Chirographers office & indentures delivered to both parties. John Stiles wishes to sell a piece of land to Tom Jones - Tom must pretend a covenant on the part of Stiles to convey this land to him. On a supposed breach of this covent. Tom grounds an action of covent & after paying a clever fee to the King he may proceed with his writ. After the suit is commenced, Stiles proposes to compromise matters without going thro a course of Judicial proceedings & Tom glad to see John so complying asks leave of the Ct. to settle the business which he is graciously suffered to do on his putting another fee into his majestys pocket. The agreemt. is then made, noted & footed. The wholebusiness is recorded & indentures delivered. A fine binds not only the parties but all other persons unless their claims are pursued within 5 years after the fine is levied - unless such persons were under particular disabilities & then 5 years are allowed after such disabilities are removed.

The beginning & ending of the reigns of the Successive Kings of England

Century			
9		Egbert the 1st Monarch began	827
9		Ethelwolf his son	837
9	9	Ethelbald 1st son of Ethelwolf	857
		Ethelbert 2nd son of Dº	860
		Ethelred 3rd son of Dº	866
		Alfred 4th son of Dº	872
		Edward the elder	899
		Athelstan son of Edward the Elder	929
		Edmund 1st the 5th son of Dº	940
		Edred son of Dº	947
10		Edway son of Dº	955
		Edgar son of Dº	959
		Edward the Martyr eldest son of Edgar	973
		Ethelred 2nd half brother to Edward	979
Danes		Swain the Dane	1013
		Canute his son	1014
Saxons		Ethelred 2nd again took possession	1015
		Edmund Ironside his son	1016
11		Canute again established himself	1017
Danes		Harold 1st son of Canute	1035
Saxons		Edward the Confessor	1042
		Harold 2nd son of Earl of Kent	1066
		William the conqueror (3rd stock)	1066
Normans		descendant of Canute	
		William 2nd son of the Conqueror	1087

Century		Dom.
12	Henry 1st son of Wm Conqr	1100
	Stephen Nephew to Henry	1135
	Henry 2nd Grandson of Henry 1st	1154
Norman Leg. Mon.	Richard 1st son of Henry 2nd	1189
	John son of Henry 2nd Mag. Charta.	1199
13	Henry 3rd Son of John	1210
	Edward son of Hen.	1272
14	Edward 2nd his son	1307
	Edward 3rd son of Edw 2nd	1327
	Richard 2nd Grandson of the Black Prince Edward 3rd	1377
	Henry 4th Grandson of John of Gaunt son of Edward 3rd	1399
Henry 6 son of Henry 5 his son	Edward 4th descd of Edw 3rd	1461
15	Edward 5th his infant son	1471
	Richard 3rd Brother of Edw 4th	1483
	Henry 7th	1485
16	Henry 8th son of H. 7th	1509
	Edward 6th Son of Hen. 8th	1547
	Jane Gray his cousin	1553
	Mary daughter of Hen: 8th	1553
	Elizabeth daughter of Hen: 8 by Ann B.	1558
17	James 1st of Engd & 6th of Scotd son of Mary & Hen.	1603
	Charles 1st his son	1625
	Cromwell the usurper	1653
	Richard his son	1658
	Charles 2nd son of Car: 1st	1660
	James 2nd Brother to Car: 2nd	1685
	William 3rd Prince of Orange & Mary	1688
18	Anne	1702
	George 1st	1714
	Geo: 2d his son	1727
	Geo: 3rd his Grandson to Geo: 2nd	1760

House of Plantagenet — Grandson of Henry 1st by his daughter the Empress Matilda and her 2d husband Geoffry Plantagenet.

1399 / 1413 / 1422 — House of Lancaster

House of York

House of Tudor

Great grandson of James 4th of Scot. by Margaret daughter of Henry 7th

House of Stuart

This Mary, wife of Wm was daughter of James 2d & excluded the son of James 2d called the Pretender who went with his father when he abdicated but was excluded from the succession by Act of Parl. being a Roman Catholic.

daughter of James 2d

House of Hanover

N.B. Elizabeth, daughter of James 2d married the Elector Palatine and left a daughter Princess Sophia who married the Duke of Brunswick Luneneburgh by whom she Sophia had George 1st Elector of Hanover who took the throne by Act of Parliament expressly made in favor of his mother.